84-115

No.

Office-Supreme Court, U.S.
FILED
JUL 20 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARIO LOPEZ, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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126 pp

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-6126

D.C. No. 83-0697-WPG(T)

MARIO LOPEZ, ET AL., PLAINTIFFS-APPELLEES

vs.

MARGARET M. HECKLER, Secretary of Health and Human Services, ET AL., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted December 13, 1983

[Filed Feb. 22, 1984]

OPINION

Before PREGERSON, BOOCHEVER, and REINHARDT, Circuit Judges

REINHARDT, Circuit Judge:

The Secretary of Health and Human Services ("Secretary") appeals a preliminary injunction or-

dering her to restore disability benefits to a large number of former recipients of Social Security benefits. Plaintiffs are a class consisting of disabled workers and poor and disabled persons who had earlier been found eligible for Social Security Disability Insurance (SSDI) benefits and Supplemental Income (SSI) benefits respectively. *See* 42 U.S.C. §§ 401-31 (1976 & Supp. V 1981) (SSDI); 42 U.S.C. §§ 1381-83 (1976 & Supp. V 1981) (SSI). Plaintiffs challenged the Secretary's termination of their benefits on the ground that the Secretary unconstitutionally refused to give effect to two decisions of this court describing the procedures the statute requires the Secretary to follow in terminating benefits. The district court found that plaintiffs were likely to succeed on the merits of their claims. It also found that many of the plaintiffs, deprived of the very means with which to live, have either died or suffered further illness as a result of the challenged conduct. Accordingly, the court issued a preliminary injunction which, among other things, enjoined the Secretary to reinstate the benefits of many of the plaintiffs pending litigation of this case.

The Secretary challenges the injunction on two main grounds. First, she argues that the district court lacked jurisdiction over many of the individuals to whom it gave preliminary relief. She claims that jurisdiction was lacking over those individuals who had not exhausted their administrative remedies before commencing this action and over those individuals who had failed to commence this action within sixty days of receiving a final decision from the Secretary. Second, she argues that the district court was barred by sovereign immunity from awarding interim benefits.

FACTS

The preliminary injunction under review here was granted to a class of former disability benefits recipients who are challenging the constitutionality of the procedures used by the Secretary to terminate their benefits. Plaintiffs made two constitutional arguments in the district court—one based on the doctrine of separation of powers, the other based on the due process clause of the fifth amendment.

The separation of powers argument is a challenge to the Secretary's policy of "nonacquiescing" in two decisions of this court. In *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), and *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981), we held that, under the applicable statutes, the Secretary was required, before terminating a recipient's Social Security benefits, to come forward with evidence that a recipient's medical condition has improved.[1] Although the Secretary disagreed with the holdings in *Patti* and *Finnegan*, she did not seek Supreme Court review of either case. Instead, she announced in published Social Security rulings that she "does not acquiesce" in and would not follow the holdings in either case. *See* Social Security Rulings 82-10c and 82-49c. Accordingly, she ordered that Social Security Disability benefits be terminated for lack of disability regard-

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[1] *Finnegan* decided the question with regard to "grandfatherees," i.e., individuals who had been transferred to the federal rolls from a state public assistance plan when the Supplemental Security Income (SSI) program was established. *Patti* was an action brought by an SSI claimant who was not a grandfatheree. Although the district court did not subdivide the class it certified, we shall refer to class members who were grandfatherees as "*Finnegan*-type claimants," and the other class members as "*Patti*-type claimants."

less of whether the recipient's medical condition has improved since the initial disability determination. *Id. See also* Social Security Ruling B1-6.

Plaintiffs argue that the Secretary's policy of "nonacquiescing" in this court's decisions violates the constitutional doctrine of separation of powers. They note that "it is, emphatically, the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). They argue that, by "nonacquiescing," the Secretary is usurping the lawful authority of the judiciary and placing herself above the law. That, they claim, is a plain violation of the Constitution. *See also* U.S. Const. art. II, § 3 (The President "shall take Care that the Laws be faithfully executed.").

Plaintiffs' second constitutional contention is based on the due process clause of the fifth amendment. The thrust of that argument is as follows: The due process clause entitles applicants and recipients of public benefits to have their claims fairly adjudicated by the agency. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). The Secretary's policy of nonacquiescence, by foreordaining the outcome of the hearings claimants will receive, denies plaintiffs a meaningful opportunity to be heard. The availability of judicial review does not cure this flaw.

The Secretary opposed the preliminary injunction on the ground that, except with regard to the parties to a particular action, she is not bound to give effect to court decisions. She also argued that plaintiffs in any event would not suffer irreparable injury as a result of the assertedly illegal action. Finally, she argues that the court lacked jurisdiction over many

of the class members and that the court lacked statutory authority to award the type of relief prayed for.

The district court rejected the Secretary's arguments. It certified a class consisting of

> all persons who live within this circuit, who (a) receive or received Supplemental Security Income disability benefits or Social Security disability insurance benefits and have been or will be considered for termination after August 30, 1981, or (b) receive or received Supplemental Security Income disability benefits under the "grandfather clause" of the Social Security Act, 42 U.S.C. § 1382c(a)(3)(E), and have been or will be considered for termination after August 25, 1980, such consideration being or having been for the asserted reason that the claimant's disability had ceased.

The district court found that plaintiffs were likely to succeed on the merits. It believed the Secretary was violating the fundamental precept, first enunciated in *Marbury v. Madison*, that government agencies are required to follow and apply the law as interpreted by the courts—the "cornerstone of the doctrine of Separation of Powers that has served our country so well." It also found that the balance of hardships as between the litigants tips sharply in favor of the plaintiffs, who have "already suffered deprivation of life's necessities, further illness, or even death from the very disabilities that the Secretary deemed them not to have," and for whom "[r]etroactive relief would be inadequate, and perhaps too late, to ensure that the purpose of the Social Security disability benefits, i.e., provision of a minimum standard of living for the poor and disabled, will be served." The court found that plaintiffs thus

satisfied both of this circuit's alternative tests for granting a preliminary injunction.[2] It accordingly issued a preliminary injunction restraining the Secretary from "failing to follow, implement or accord precedential effect to" *Finnegan* and *Patti*, and from implementing the nonacquiescence policy. In addition, paragraph 4(c) of the preliminary injunction required the Secretary to notify the class members that they may apply for reinstatement of benefits and provided that those recipients who assert their belief that they remain disabled would be entitled to reinstatement of their benefits until the Secretary terminates the benefits in compliance with *Patti* and *Finnegan*.[3]

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[2] We have held that, to obtain a preliminary injunction, a moving party must show "*either* a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Beltran v. Meyers*, 677 F.2d 1317, 1320 (9th Cir. 1982) (emphasis in original).

[3] Paragraph 4(c) of the Preliminary Injunction reads as follows:

> (c) In order to accomplish appropriate restoration of disability benefits pending resolution of this action, the court orders the defendants to implement the following procedure:
>
> > (i) Within sixty (60) days following the date of this order, the defendants will notify (a) each class member who had been receiving Supplemental Security Income Disability benefits under 42 U.S.C. § 1382c(a)(3)(E), and who was terminated from such benefits after August 25, 1980, and (b) all other persons who have been terminated from either Title II social security disability insurance or Title XVI Supplemental Security Income Disability after

The Secretary sought a stay of part of the preliminary injunction pending appeal of that injunction to this court. She did not seek to stay the injunction's requirement that she give effect to the *Patti* and *Finnegan* decisions with regard to all future terminations. She only sought to stay paragraph 4(c).

The Secretary's request for a stay was denied by both the district court and this court, *see Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983), but then granted by Justice Rehnquist, *Heckler v. Lopez*, 104

August 30, 1981, for the purported reason that his or her disability had ceased, whether or not such person has appealed, that:

> Such person may apply for reinstatement of benefits if he or she believes that his or her medical condition has not improved following the granting of disability benefits.

(ii) Upon receiving such application, the defendants will forthwith reinstate and pay benefits in the monthly amounts such person would have been receiving had his or her benefits not been interrupted.

(iii) Following such reinstatement, if the defendants or their agents or employees conduct a disability investigation or other screening of such person, they will apply the standards set forth in *Patti v. Schweiker* and *Finnegan v. Matthews* and, if they conclude that such person's medical condition has improved and he or she is no longer disabled, they will identify the evidence relied upon to reach that conclusion.

(iv) Following such review, persons who are notified of an initial determination that their benefits shall cease shall be given an opportunity to contest the determination and pending such review, they shall continue to receive aid as provided in current laws and regulations.

S. Ct. 10 (1983) (Rehnquist, J., in chambers). Justice Rehnquist recognized that stay applications to Circuit Justices on matters before courts of appeals should rarely be granted, but felt that this case was sufficiently unusual to warrant the requested relief. 104 S. Ct. at 12. Justice Rehnquist had serious doubt whether paragraph 4(c)'s requirement that the Secretary pay benefits to class members merely upon their statement that they believe their medical condition has not changed since the Secretary's earlier determination was "consistent with 42 U.S.C. § 405 (i) or with this Court's admonition in *Schweiker v. Hansen*, 450 U.S. 785 (1981), that the courts have a duty 'to observe the conditions defined by Congress for charging the public treasury,' *id.*, at 788 (quoting *Federal Crop Insurance Co. v. Merrill*, 332 U.S. 380, 385 (1947))." 104 S. Ct. at 14. That problem, Justice Rehnquist thought, was exacerbated by the fact that the injunction gave relief to persons who, Justice Rehnquist believed, had not exhausted their administrative remedies or even presented their claims to the Secretary as required by section 405(g) of the Social Security Act, 42 U.S.C. § 405(g) (Supp. V 1981). Those factors, he felt, justified staying the preliminary injunction even in the face of the irreparable injury he assumed plaintiffs would suffer without the injunction.

Plaintiffs then requested the Supreme Court to vacate the stay entered by Justice Rehnquist. A divided Court denied plaintiffs' application. *Heckler v. Lopez*, 104 S. Ct. 221 (1983). Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Largely for the reasons stated in our opinion denying the stay, Justices Brennan and Marshall believed that the Secretary was not likely to succeed on the

merits of her claims, and that the "overwhelming evidence of irreparable harm . . . should be the determinative factor . . . ." 104 S. Ct. 225, 227. They would therefore have vacated the stay.

Justice Stevens filed an opinion, in which Justice Blackmun joined, concurring in part and dissenting in part. Justices Stevens and Blackmun would have vacated the stay except insofar as it covered persons who had received final decisions from the Secretary more than sixty days before the commencement of this action and who had not timely sought judicial review. Those persons' right to seek review of their termination decisions, Justices Stevens and Blackmun believed, had expired by the time this action was brought. Justices Stevens and Blackmun disagreed with Justice Rehnquist, however, regarding the plaintiffs' compliance with the Act's presentation and exhaustion requirements. With regard to persons whose claims had not expired, Justices Stevens and Blackmun believed the stay was improperly granted. While recognizing that a Circuit Justice's grant of a stay is entitled to substantial deference and "should not be disturbed simply because the other members of the Court would have declined to grant the stay as an original matter," 104 S. Ct. at 222, they believed that this was a case in which reexamination of the stay was proper. Accordingly, they would have vacated the stay in part.

Save for the requirement that she notify class members of their rights, the Secretary on this appeal challenges the same provisions of the preliminary injunction she challenged in her application for a stay.[4]

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[4] Because she has already complied with the notification requirement of paragraph 4(c)(i), any challenge to that provision would be moot.

She argues that (a) the court lacked jurisdiction over the persons to whom it gave preliminary relief who had either failed to exhaust their administrative remedies or failed to initiate judicial review within the requisite time period, and, (b) because the court lacked statutory authority to award benefits, the relief given was barred by the United States' sovereign immunity. She also argues that there would appear to be no basis whatsoever for awarding relief to persons whose benefits were terminated before *Patti* and *Finnegan* became final.

BACKGROUND

This appeal does not raise issues of judicial interference in administrative agencies' discretion to formulate their own procedures, *see Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978), or of courts "dictating to the agency the methods, procedures, and time dimension" of inquiries within its jurisdiction. *See FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). While those considerations might conceivably be relevant in determining whether a court should require the Secretary to come forth with evidence of medical improvement before terminating benefits, that is not the question before us now. For the purposes of this appeal, the Secretary does not challenge the correctness of our holdings in *Patti* and *Finnegan*. Nor, indeed, is that question open in the district court. We have already held that the Social Security Act forbids the Secretary from terminating benefits of persons she has determined to be disabled until she comes forth with evidence of medical improvement. That is the law in this circuit.

Far from raising questions of judicial interference in executive actions, this case presents the reverse constitutional problem: the executive branch defying the courts and undermining what are perhaps the fundamental precepts of our constitutional system—the separation of powers and respect for the law. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Cooper v. Aaron*, 358 U.S. 1 (1958).[5]

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[5] In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), the Supreme Court stated that "it is emphatically the province and duty of the judicial department to say what the law is." In *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the Court stated that

> [*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and by the Country as a permanent and indispensable feature of our constitutional system.

In *Cooper*, the Court said that it followed from that "basic principle" that the federal judicial interpretation of the Constitution is the "supreme Law of the Land" referred to in the supremacy clause, U.S. Const. art. VI, § 2. The Court reasoned further that state officers, committed by oath to support the Constitution, are bound by such interpretations of the instrument. What the Court said with regard to the Constitution applies with full force with regard to federal statutory law, which is also the "supreme Law of the Land," U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."), and applies just as strongly to federal executive officers, who, as the President's representatives, are required by the Constitution itself to "faithfully execute" the law. U.S. Const. art. II, § 3. Indeed, in *Marbury v. Madison*, Chief Justice Marshall derived the principle of judicial review from the duty of courts to interpret and apply ordinary law.

The Supreme Court's recent holding in *United States v. Mendoza*, —— U.S. —— (1984), is not to the contrary. In

Of equal significance, the district court has found that some class plaintiffs have already died or suffered further illness as a result of the Secretary's actions. We agree with that finding. It follows that, in the absence of an injunction, other old or infirm people will die or be subjected to additional serious pain and suffering. It is in that light that we must now determine whether we should overturn the district court's preliminary injunction, an order that governs the rights of the parties only until such time as the case is decided on its merits.

Mendoza, the Court held that the doctrine of nonmutual collateral estoppel does not apply against the United States. Accordingly, the government's failure to appeal an adverse district court decision on a constitutional question was held not to prevent it from relitigating the same question in a case against a different party. A contrary holding, the Court explained, would impose on the government, which litigates by far more frequently than any private party, the onerous burden of appealing every holding with which it does not agree and would substantially thwart the development of important questions of law by freezing the first final decision on a particular issue.

Plaintiffs here, however, do not seek to invoke collateral estoppel. Nor do they contend that there is no judicial forum in which the Secretary can obtain a ruling that she may handle benefit claims in a manner she believes proper. Rather, they argue only that the executive must give general effect within a circuit to a final decision of the Court of Appeals for that Circuit interpreting a federal law. Such a rule does not limit the government's ability to delay testing legal issues in the Supreme Court until conflicts have arisen among the circuits. Nor does it otherwise limit the discretion and flexibility the government needs in its handling of litigation. It requires only that the executive branch recognize the authority of appellate courts to interpret the law and that it refrain from acting in an arbitrary and lawless manner.

STANDARD OF REVIEW

In reviewing the grant or denial of a preliminary injunction, we apply an abuse of discretion standard. *See Wilson v. Watt*, 703 F.2d 395, 398 (9th Cir. 1983). We reverse only if we conclude that the district court's decision was based on an error of law or on clearly erroneous findings of fact. *See id.; Beltran v. Myers*, 677 F.2d 1317, 1319 (9th Cir. 1982); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 501 (9th Cir. 1980). Application of an incorrect legal standard for preliminary relief and misapprehension of the law with regard to the underlying issues in the case are grounds for reversal. *See Sports Form, Inc. v. United Press International, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982); *Wright v. Rushen*, 642 F.2d 1129, 1132 (9th Cir. 1981).

Before granting a preliminary injunction, a district court must find that the moving party has demonstrated "*either* a combination of probable success on the merits and a possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Beltran v. Meyers*, 677 F.2d 1317, 1320 (9th Cir. 1982) (emphasis in original). The tests are "not separate," but represent the "outer reaches of 'a single continuum.'" *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (quoting *Benda v. Grand Lodge of International Association of Machinists and Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979)). At no point in the continuum is the court "bound to decide doubtful or difficult questions of law." *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 153 (9th Cir. 1965). "[T]he relative

hardships to the parties" is the "critical element" in deciding when a stay is justified. *Benda*, 584 F.2d at 314-15. Finally, the public interest is a factor to be strongly considered in cases such as this one. *See Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977).

For purposes of this appeal, the Secretary does not dispute the district court's finding that the balance of hardships tips sharply in plaintiffs' favor. Nor does she deny that the public interest favors granting the injunction. The Secretary's arguments relate only to some aspects of the merits of the case to be litigated. Our task, therefore, is to review the district court's finding that the plaintiffs are likely to succeed on the merits. To the extent we are convinced that the district court misapprehended the law in arriving at that conclusion, we must vacate the injunction as an abuse of discetion. However, to the extent we believe plaintiffs raise serious questions of law or are likely to prevail on those questions, we must, in light of the undisputed findings concerning hardship and the public interest, affirm the injunction. *See Wilson v. Watt*, 703 F.2d at 399. A court of appeals, like a district court, is not required to resolve doubtful or difficult questions of law at this preliminary stage. *See Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) ("[O]n application for preliminary injunction the [district] court is not bound to decide doubtful and difficult questions of law.").

The Secretary argues that *de novo* review of the district court's decision is required because she is challenging the district court's jurisdiction to award the relief it awarded here. The Secretary's observation is no more than a specific application of the gen-

eral rule stated above that all legal issue are reviewable *de novo*. We agree that no deference should be given to the district court's findings with regard to legal, including jurisdictional, issues in this case and that we should therefore review *de novo* the district court's finding that plaintiffs are likely to succeed on the merits of those issues. With regard to any underlying factual findings, however, we see no reason to depart from the usual deferential standard of review.

Although the Secretary did not say so, she may have been attempting to argue that we are required to decide *finally* all jurisdictional issues, instead of merely reviewing the district judge's determination that plaintiffs raised serious legal questions and were likely to succeed on the merits. The cases she cites, however, hold only that a grant of a preliminary injunction is an abuse of discretion when "want of jurisdiction is evident upon the face of the bill," *United States v. Corrick*, 298 U.S. 435, 438 (1936), and that a preliminary injunction should be overturned on appeal when there is "an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion," *Myers v. Bethlehem Steel Corp.*, 303 U.S. 41, 52 (1938). Those cases are consistent with our holding that "doubtful or difficult questions of law" need not be finally resolved at this preliminary stage. *See Dymo Industries*, 326 F.2d 141, 143 (9th Cir. 1964). We see no reason to treat complex jurisdictional issues any differently from other complex legal issues. Nor do we think that an injunction that the court has jurisdiction to issue but which covers too many individuals presents the same

type of threshold jurisdictional problem as an injunction that the court has no jurisdiction to issue at all. In any event, the argument that the Secretary may have been attempting to make would be applicable at most to three issues in this case—those involving the presentation requirement, mandamus jurisdiction, and sovereign immunity. Those are the only issues that are even arguably denominable as "jurisdictional." As is made clear below, even if the argument that we are required to decide those issues is correct, it would not affect the outcome of this appeal.

DISCUSSION [6]

I. *CLASS MEMBERS WHOSE BENEFITS WERE TERMINATED BEFORE* PATTI *AND* FINNEGAN *BECAME FINAL.*

The preliminary injunction issued by the district court grants relief to *Finnegan*-type claimants whose benefits "have or will be terminated after August 25, 1980," and to *Patti*-type claimants whose bene-

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[6] Before discussing the issues raised in this appeal, a preliminary point should be mentioned: although Justice Rehnquist considered many of the same issues upon granting the Secretary's stay request, we do not give controlling weight to the decision of a majority of the Court not to vacate the stay he granted. As Justice Stevens noted in his opinion concurring in part and dissenting in part, "in considering an application of this kind, substantial deference must be paid to the judgment of the Circuit Justice . . . . The Circuit Justice's decision should not be disturbed simply because the other members of the Court would have declined to grant the stay as an original matter." 104 S. Ct. 221, 222 (1983) (citation omitted). Thus, we cannot assume from the Court's action that all the Justices in the majority agreed with Justice Rehnquist's application of the relevant law.

fits "have or will be terminated after August 30, 1981." The district court arrived at those dates by adding 60 days to the dates the respective decisions became final and then subtracting a year. The 60 days represented the amount of time the district court believed was available for the Secretary to seek Supreme Court review of the decisions.[7] The year was subtracted because the Secretary has authority to reopen an administrative decision for any reason within one year. *See* 20 C.F.R. 404.988, 418.1466 (1983).

The Secretary argues that there is no basis for granting any relief to claimants who had received final decisions on their terminations before *Patti* and *Finnegan* became final. We believe that the Secretary is clearly correct on this point.

Although the regulations specifically authorize the Secretary to reopen decisions within one year for any reason, the Supreme Court has squarely held that the Secretary's decision not to reopen a case is, unless challenged on constitutional grounds, entirely a matter of the Secretary's discretion not reviewable by the courts. *Califano v. Sanders*, 430 U.S. 99 (1977). This is not a case in which the refusal to reopen raises constitutional problems. Indeed, claimants who had received final decisions before the case

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[7] Under 28 U.S.C. § 2101(c) (1976), the government actually has ninety days in which to file a certiorari petition. When this was pointed out to the district court, the court refused to modify the injunction and instead reaffirmed the sixty-day period as a compromise between the ninety days urged by the government and the 30-day period urged by the plaintiffs as the time allowed to seek a stay of the mandate of a court of appeals. *See* Fed. R. App. P. 41(b). The court's decision in this regard was plainly within the scope of its discretion.

they rely on was decided cannot even raise the constitutional challenge to the underlying termination raised by the other claimants here. Thus, regardless of how wrongful the district court may have believed a refusal to reopen would have been under the circumstances presented by this case, the court lacked the authority to grant any relief to claimants who had received final decisions on their terminations before the case they rely on was decided. We therefore vacate the preliminary injunction to the extent it granted relief to *Finnegan*-type claimants whose benefits were terminated before August 25, 1981, and to *Patti*-type claimants whose benefits were terminated before August 30, 1982, unless they then either were in the process of appealing the termination or still had time remaining for so doing.[8]

II. *PROCEDURAL REQUIREMENTS*

A. *42 U.S.C. § 405(g)*

Section 405(g) specifies three requirements for judicial review of decisions by the Secretary: (1) a final decision made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision, or such further time as the Secretary may allow; and (3) filing of the action in an appropriate district court. 42 U.S.C. § 405(g) (Supp. V 1981). On appeal, the Secretary does not challenge the appropriateness of the district court's venue. She does argue, however, that some

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[8] The new dates retain the 60-day period that the district court added to the dates the decisions became final. We have held that the court's decision so to limit the class was well within its discretion. *See supra* note 7.

plaintiffs have not met the first two requirements. Her arguments are addressed below.

1. *The Finality Requirement*

The Supreme Court has interpreted the first requirement—that of a final decision made after a hearing—as consisting of two separate elements; (a) the waivable element that administrative remedies be exhausted (the exhaustion requirement), and (b) the nonwaivable element that the claim for benefits be presented to the Secretary (the presentation requirement). *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976). The two parts of the finality requirement will be addressed separately.

a. *The Exhaustion Requirement*

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Supreme Court held that the exhaustion requirement was not jurisdictional, but could be waived. It recognized that there were situations in which requiring exhaustion "would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." 422 U.S. at 765-66. In such cases, a decision may be deemed "final" before exhaustion of remedies is completed.

We believe that this is plainly the type of case as to which exhaustion of remedies would be futile. In *Salfi*, the Court described the policies behind the exhaustion requirement:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity

> to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

433 U.S. at 765. None of those policies would be proved by requiring exhaustion of administrative remedies with regard to the constitutional questions involved here. The question whether the Secretary is bound to apply the clear holdings of a United States Court of Appeals to persons within the circuit who were not parties to the original action is, one hopes, not a question as to which the Secretary has much experience or expertise to offer. Nor would compiling an administrative record be particularly useful in resolving that question. The possibility of the agency correcting its own errors at any level but the very top is precluded by the Secretary's order that this court's holdings not be followed. And the formality with which the Secretary has expressed her policy of nonacquiescence makes it clear that she herself will not correct the error. Indeed, in her briefs the Secretary does not even suggest the possibility that she might reconsider the validity of her nonacquiescence policy. Instead, she argues that exhaustion is not futile because many of the claimants may have their benefits reinstated even under the nonacquiescence policy. Plainly, however, plaintiffs are entitled to base their claims for benefits exclusively on the argument that the Secretary's refusal to apply the law as interpreted in *Patti* and *Finnegan* is unconstitutional. Requiring the claimants to go through several levels of administrative appeals with that claim would clearly be a "commitment of administrative resources unsupported by an administrative or judicial interest." *See Salfi*, 422 U.S. at

766. Indeed, such an exercise would seem to be the very height of futility.

With regard to the underlying statutory claim, the futility of exhaustion is even clearer. The issue whether the Secretary must present medical evidence before terminating benefits has not only already been litigated through all the required administrative levels, it has also already been decided by the federal district courts in *Patti* and *Finnegan* and by this court. On the underlying substantive claim, the position of the Secretary could not be clearer. That nothing short of a court order will suffice to vindicate the asserted right is demonstrated glaringly by the fact that the Secretary has only given effect to the holdings in *Patti* and *Finnegan* with regard to the parties to those actions. As the facts of this case illustrate, exhaustion of administrative remedies is futile by definition in any case challenging an announced policy of nonacquiescence.[9]

The Court suggested in *Salfi* that determining whether exhaustion is futile may be a question reserved exclusively for the Secretary. 422 U.S. at 766 ("A court may not substitute its conclusion of futility for the contrary conclusion of the Secretary."). In *Eldridge*, however, the Court made it

[9] Although the announcement of the policy of nonacquiescence removes any doubt about the futility of pursuing administrative remedies, we believe that, even in the absence of the announcement, the Secretary's disregard of the holdings in *Patti* and *Finnegan* would certainly be enough to raise serious questions as to whether pursuing administrative remedies would be futile. We therefore hold that the required preliminary showing on this issue was satisfactorily made even by those class members who, before the relevant Social Security rulings were issued, had allowed the time for initiating an administrative appeal to run.

clear that, under certain circumstances, courts may waive the exhaustion requirement over the Secretary's objection. The Court recognized that "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S. at 330.

In *Eldridge*, plaintiff claimed that the Constitution entitled him to an evidentiary hearing before termination of his benefits. The Court thought that deferring to the Secretary's conclusion regarding futility was inappropriate in that case because the constitutional challenge was "entirely collateral" to the claim for benefits and because, "unlike the situation in *Salfi*, denying Eldridge's substantive claim 'for other reasons' or upholding it 'under other provisions' . . . would not answer his constitutional challenge." 424 U.S. at 331-32 (citation omitted).

Here, as in *Eldridge*, plaintiffs present a constitutional challenge [10] entirely collateral to the substan-

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[10] Although plaintiffs have clearly framed their case as one seeking to vindicate constitutional rights, three Justices, on the limited pleadings and record presented to the Supreme Court on the motion to stay the temporary restraining order, signed opinions which appear to question whether plaintiffs' claims are indeed constitutional. Justice Rehnquist viewed the plaintiffs' claims as alleging merely that the Secretary's evidentiary showing was insufficient. 104 S. Ct. at 15. And although they did not elaborate, Justices Stevens and Blackmun indicated that they too believed that the constitutional nature of plaintiffs' claims should be disregarded. 104 S. Ct. at 224.

We believe that plaintiffs' claims may properly be treated as constitutional for purposes of the inquiry before us. Although plaintiffs' standing rests on their entitlement to benefits that the Secretary has terminated without the required evidentiary showing, plaintiffs have based their claim for benefits almost exclusively on constitutional arguments. More im-

portantly, the Secretary defends her case on the merits by asserting her power to ignore the holdings of this court. Because the arguments on both sides are therefore predominantly constitutional on the merits, deciding this case will almost certainly require resolution of constitutional questions. For purposes of determining whether exhaustion should be waived, it is the constitutional nature of the questions to be resolved, not of the right to be vindicated, that should be important. As the Court explained in *Califano v. Sanders*, 430 U.S. at 109, *Salfi* and *Eldridge* rested in part on the view that "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." Thus, even assuming that plaintiffs here are not seeking to enforce their constitutional rights, we believe that this case should be considered a constitutional one for purposes of determining whether waiver of the exhaustion requirement is appropriate. Whether plaintiffs' claims are "constitutional" for purposes of the 60-day limitation, *see infra*, is a somewhat more difficult issue. We believe, however, that plaintiffs have at least raised serious legal questions with regard to that issue.

We also note that considering this a constitutional case would not "open the floodgates," even if we focused on the right to be vindicated. Unlike the ordinary case in which the Secretary is alleged to have applied the law incorrectly, and which might arguably be framed in such a way as to implicate the constitutional duty of the Secretary to apply the law faithfully, the Secretary here has announced in plain terms that she will not follow the holdings of this court. Clearly the two types of cases are materially different. While with regard to Patti and Finnegan the Secretary may have violated only a statutory duty, with regard to recipients whose benefits were terminated after *Patti* and *Finnegan* became final the Secretary also violated her constitutional duty to execute the law faithfully.

With regard to the second constitutional claim, the one based on the due process clause, the source of the Justices' doubts is not as readily apparent. Although the Court has held that a pretermination hearing is not constitutionally required in cases such as this one, *see Eldridge*, 424 U.S. at 332-49, the

tive claim for benefits.[11] Also as in *Eldridge*, denying or upholding plaintiffs' entitlement to benefits on other grounds would not answer the constitutional challenge.

Court relied in part on the availability of post-deprivation hearings before the administrative agency. Claimants here argue that the Secretary's policy of nonacquiescence renders those post-deprivation hearings meaningless. Although the argument requires further exploration and refinement, it is not on its face frivolous. In addition, the argument that a procedural scheme permitting the Secretary to terminate benefits without first coming forth with any evidence whatever violates the due process clause also would not appear to be frivolous.

This opinion discusses the Secretary's arguments as applied to both the constitutional and the nonconstitutional claims. As our opinion makes clear, we do not believe that the constitutional nature of plaintiffs' claims is likely to be determinative of the issues involved.

[11] The Secretary argues that "the contention made on behalf of the class members that their benefits may not be terminated except upon a showing of medical improvement goes to the very heart of the merits of their substantive claim for disability benefits; it is not a 'collateral' issue like the asserted right to a pretermination hearing involved in *Mathews v. Eldridge*." The Secretary's argument ignores the fact that the question the Secretary sees as the issue on the merits has already been decided by this court. The real issue on the merits is whether the Secretary must apply the holdings of this court on a general basis within this circuit. Because we agree with the district court that the plaintiffs are likely to succeed on the merits of that issue, the underlying statutory issue need not be reached. There can be no doubt that the separation-of-powers issue is entirely collateral to the substantive claim for disability benefits.

Even with regard to the underlying statutory issue, however, we believe that the Secretary's argument is without merit. Contrary to the Secretary's suggestion, the claim that the Secretary must come forth with some evidence of medical

Even if we disregarded the constitutional nature of plaintiffs' claims, this is not an appropriate case for deferring to the Secretary's conclusion regarding futility. If plaintiffs are regarded only as vindicating once again the right that this court has already held in *Patti* and *Finnegan* they are entitled to, then the claim is just as collateral to the substantive claim for benefits as was Eldridge's. And granting or denying benefits on other grounds will still not answer the claim being asserted—*i.e.*, that the Secretary may not terminate benefits before she presents medical evidence of improvement. The only difference between this case and *Eldridge* would then be that the asserted right in one case was constitutional and in the other statutory. But in determining whether deference to the Secretary on futility is appropriate the important factors should be those that bear on the reliability of the Secretary's conclusions regarding futility. Whether the source of the asserted right is the Constitution or a statute does not appear to bear on that issue. *See Heckler v. Lopez*, 104 S. Ct. 221, 224 (1983) (Stevens, J., concurring in part and dissenting in part) ("[I]t should make no difference whether plaintiffs' claim is based on the statute or the Constitution."); *Lib-*

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improvement before terminating benefits is entirely distinct from the question whether the claimant continues to be disabled. As the Secretary herself concedes, claimants may be found entitled to benefits even if *Patti* and *Finnegan* were not applied, and they may be found ineligible for benefits even under *Patti* and *Finnegan*. Like *Eldridge*, plaintiffs have complained of the procedures used by the Secretary in terminating benefits. We see no possible grounds for distinguishing their claim that benefits may not be terminated except upon a showing of medical improvement from the claim in *Eldridge* that benefits may not be terminated except after a hearing.

erty Alliance for the Blind v. Califano, 568 F.2d 333, 344 (3d Cir. 1977).

Indeed, deferring to the Secretary on futility seems even less appropriate here than in *Eldridge*. Plaintiffs here have shown that the Secretary is deliberately and unequivocally flouting the procedures she is required by law to follow. In contrast to the situation in *Eldridge*, the Secretary here knows precisely what the courts say the law is and is nevertheless refusing to apply the law as so defined. That the Secretary, as a member of the executive, is required to apply federal law as interpreted by the federal courts cannot seriously be doubted. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); U.S. Const. art. II, § 3 (The President "shall take Care that the Laws be faithfully executed").[12]

Under the circumstances prevailing here, it is likely not only that administrative appeals would prove fruitless, but also that the Secretary is using the exhaustion requirement as a mechanism to evade the law she is required to apply. Once bad faith and abuse of the statutory procedures have been shown to the extent shown here, requiring exhaustion seems not just unnecessary, but a perversion of the

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[12] The Secretary, in defending her nonacquiescence policy, pointed out in the district court that the Internal Revenue Service issues nonacquiescence rulings frequently. IRS nonacquiescence rulings, however, are not applicable within the circuit that rendered the opinion the IRS does not acquiesce in. That is plainly a material difference. Because conflicts among the circuits are inevitable, the executive clearly cannot be expected always to give nationwide effect to the holdings of a Court of Appeals. But, far from supporting the Secretary's argument, the IRS's nonacquiescence policy recognizes that the holdings of a Court of Appeals must be given effect within the circuit.

administrative and judicial system. We believe that the Secretary's decision to terminate claimants' benefits without complying with the procedures required by the statute became "final" with regard to each class member, and thus immediately reviewable by the district court, at the point each class member's benefits were terminated.

b. *The Presentation Requirement*

The Secretary argues that the nonwaivable element of the finality requirement has not been met because plaintiffs have not shown that all members of the class have filed a claim for benefits. We disagree. Courts have interpreted the presentation requirement liberally. In *Eldridge*, the Court suggested that all that was necessary to fulfill the nonwaivable element was a claim that may be said to form the basis for "some decision by the Secretary." 424 U.S. at 328. Accordingly, some courts have found that mere termination of benefits fulfills the presentation requirement. *See Kuehner v. Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983); *Ellison v. Califano*, 546 F.2d 1162, 1164 (5th Cir. 1977); *Wilson v. Edelman*, 542 F.2d 1260, 1270-71 (7th Cir. 1976); *Kennedy v. Harris*, 87 F.R.D. 372, 376 (S.D. Calif. 1980). These decisions seem eminently sensible. Underlying them is the theory that the claimant's failure to report that his disability has ceased constitutes a continuing claim for benefits and that that claim is denied when the Secretary terminates the benefits. All of the class members here have had their benefits terminated by the Secretary and have thus met the presentation requirement as defined by these courts.

Even if mere termination were not sufficient to satisfy the presentation requirement, plaintiffs would prevail on this issue. Each plaintiff, shortly before his benefits were terminated, submitted a completed Social Security questionnaire indicating that he believed he was still disabled and entitled to benefits. The Supreme Court has held that section 405(g) requires no more formal a presentation than that. *Eldridge*, 424 U.S. at 329. Although in *Eldridge* the plaintiff had submitted both a questionnaire and a letter, the presence of the letter does not distinguish *Eldridge* from this case. The point was that the plaintiff had "specifically presented the claim that his benefits should not be terminated because he was still disabled." *Id.* Even without the letter, the questionnaire served that purpose in *Eldridge*, and it suffices here as well. *See also Heckler v. Lopez*, 104 S. Ct. 221, 223 n.2. (1983) (Stevens, J., concurring in part and dissenting in part) ("Eldridge's letter hardly added to the 'claim' he had already presented."); *cf. Wheeler v. Heckler*, 719 F.2d 595, 599-600 (2d Cir. 1983) (presentation requirement not satisfied because "plaintiffs presented no allegations that the unnamed plaintiffs had initiated even informal communications with SSA or DDSD, either prior or subsequent to receipt of a termination notice.").

The Secretary concedes, as she must, that the presentation required by section 405(g) is *not* the presentation of a challenge to the termination decision. *Eldridge* would dispose of any such argument, for Eldridge presented both the questionnaire and the letter *before* his benefits were terminated. Moreover, requiring that the claim be presented after the termination would have the curious effect in this case of requiring that the presentation come

after the final decision, when, as discussed above, the statute clearly contemplates that the presentation be the *basis* for the final decision. It is for the same reason that the Secretary errs when she argues that section 405(g) requires that the claim be presented after a tentative termination decision. If presentation of the claim must form the basis for the Secretary's final decision, then it should form the basis for her tentative decision as well. The Secretary's suggestion would have the effect of requiring a presentation in the middle of the decision-making process, whereas Congress appears to have envisioned the presentation as the initiation of that process.

2. *The Sixty-Day Limitation*

Section 405(g) provides that judicial review of final decisions of the Secretary must be "commenced within sixty days after the mailing . . . of notice of such decision or within such further time as the Secretary may allow." 42 U.S.C. § 405(g) (Supp. V 1981). The Secretary argues that the preliminary injunction must be reversed insofar as it grants relief to persons who received a final decision from the Secretary more than 60 days before the commencement of this action. Plaintiffs argue that, when administrative exhaustion is waived, a time limitation that comes into play only after administrative exhaustion is completed must also be waived. Neither argument is entirely correct.[13]

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[13] As noted above, Justices Stevens and Blackmun concurred in the majority's denial of plaintiffs' application to vacate the stay insofar as it stayed those parts of the preliminary injunction that applied to persons who had received final decisions from the Secretary more than 60 days before the commencement of this action and who had not timely sought judicial re-

Insofar as plaintiffs argue that waiver of exhaustion leaves them without an exhaustion date from which to begin counting the 60 days, plaintiffs misperceive the effect of a waiver of the exhaustion requirement. Section 405(g) authorizes federal courts to review "final decisions" of the Secretary. As *Salfi* and *Eldridge* make clear, waiver of the exhaustion requirement constitutes a determination, either by the Secretary or by the court, that the Secretary's decision became sufficiently final to warrant judicial review before exhaustion of administrative remedies was completed. In demonstrating that administrative exhaustion was futile in this case, plaintiffs have also demonstrated that they have received a final decision for purposes of the 60-day requirement.

The Secretary is mistaken, however, when she suggests that the failure of some class members to commence their civil action within 60 days of their final decisions has resulted in the expiration of their claims. As the Court made clear in *Salfi*, the 60-day limitation is not jurisdictional. 422 U.S. at 764. It is thus like the time limitation for initiation of Title VII claims, which the Court held in *Zipes v. Trans World Airlines, Inc.*, 102 S. Ct. 1127 (1982), was subject to waiver and equitable tolling. It is

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view. We note, however, that in arriving at that conclusion, Justices Stevens and Blackmun did not have the benefit of any of the arguments presented on this appeal. Because Justice Rehnquist did not rely on, or even discuss, the 60-day requirement in his opinion granting the stay, plaintiff did not address the 60-day issue in their application to the Court. Nor, indeed, had the arguments been presented adequately at any of the preceding stages. Although the Secretary did briefly mention the issue in her district court briefs, she did not urge the argument. The district court did not discuss the issue in its opinion.

thus also like the other waivable requirement of section 405(g)—the exhaustion requirement—which the Court held in *Eldridge* was waivable by the Secretary and, in unusual cases, by the court. The traditional requirements for equitable tolling of a statute of limitations are not present here. And, because she raised the issue, albeit in the most cursory manner, before the district court, the Secretary may not be deemed to have waived the 60-day requirement herself. We find, however, that plaintiffs are likely to prevail on this issue under at least one of three substantial legal theories. They have, at any rate, raised serious legal questions in all three instances.

First, we note that this is quite evidently not the type of case Congress had in mind when it designed the 60-day limitation. Section 405(g)'s time limitation differs significantly from ordinary statutes of limitations, which generally allow plaintiffs considerably more than 60 days in which to assert their legal rights. *See, e.g., Block v. North Dakota*, 103 S. Ct. 1811 (1983) (12-year statute of limitations applicable to actions to quiet title to real property in which the United States claims an interest). Ordinary statutes of limitations reflect a congressional intention to preclude litigation of stale claims and to allow parties to repose. In contrast, section 405(g), like other statutes governing review of administrative action, was designed to promote administrative efficiency. It reflects Congress's desire to facilitate the processing of large numbers of administrative claims.

In setting the time limitation for section 405(g) claims, Congress had to accommodate the agency's interest in efficient procedures with the claimant's interest in having enough time to prepare his case.

The brevity of the period it gave claimants suggests that it designed the limitation for the run-of-the-mill case involving a dispute over whether particular evidence demonstrates a disability. With regard to cases involving substantial legal, let alone constitutional issues, 60 days may provide too short a period. The problem is even graver when the case is one in which the exhaustion requirement has been waived. Unlike the ordinary claim for benefits, in which filing a civil action is simply the next step in a procedure that has been going on at the administrative level for some time and in which a complete administrative record has been compiled, plaintiffs in cases such as the one before us would, if the ordinary period were applied, have only 60 days from the time in which the initial deprivation of their rights occurred in which to prepare their cases for litigation. We doubt that Congress considered that a 60-day limitations period reasonably afforded protection to the claimant's interests in such cases. Indeed, limiting claimant's access to the courts in such cases to such a short period might infringe upon the claimant's constitutional right to be heard "at a meaningful time and in a meaningful manner." *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Boddie v. Connecticut*, 401 U.S. 371 (1971) (ordinarily valid procedural requirements constitute unconstitutional infringement on right of access to courts when applied to indigent welfare recipients seeking divorce).

In any event, a strong argument can be made that the 60-day limitation does not apply where a serious constitutional claim is presented. In *Califano v. Sanders*, 430 U.S. 99 (1977), the Court explained that the holding in *Eldridge* was derived from the "well-established principle" that a statutory scheme

should not be read "to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by ' "clear and convincing" ' evidence," and that "when constitutional questions are in issue, the availability of judicial review is presumed." 430 U.S. at 109 (quoting *Salfi*, 422 U.S. at 762). *Sanders* thus recognizes a special presumption in favor of access to courts for the resolution of constitutional questions. As discussed above, the limitations period of section 405(g) is an unduly burdensome procedural obstacle to judicial review of claims such as this one, particularly when exhaustion of administrative remedies has been waived. We believe that the presumption referred to in *Sanders* may well compel a holding that the 60-day limitations period of section 405(g) does not apply to cases involving substantial constitutional questions collateral to a substantive claim for benefits.[14] Because plaintiffs have, at the least, raised serious legal questions regarding the constitutional nature of their claims,[15] they have made the required preliminary showing that the 60-day limitation does not apply to them.

We also believe that there is, at the least, a serious possibility that plaintiffs will prevail on this issue on

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[14] The Secretary, quoting *Block v. North Dakota*, 103 S. Ct. at 1822, points out that "[a] constitutional claim can become time-barred just as any other claim can." That observation, however, misses the mark. The question before us is not whether constitutional claims may be time-barred, but whether the 60-day limitations period applies to constitutional claims as well as ordinary claims for benefits. If the 60-day limitation is inapplicable, then a substitute period must apply. Because we believe that none of these claimants waited unreasonably long before asserting their claims, we find it unnecessary to ascertain how long the alternate period is.

[15] See *supra* n.10.

the theory that the 60-day limitations period may be waived over the Secretary's objection. Although determining whether to waive the 60-day limitations period should ordinarily be a matter left to the Secretary's discretion, we believe that cases may arise in which "deference to the agency's judgment is inappropriate." *Eldridge*, 424 U.S. at 330. We believe that this is a case in which the conduct on the Secretary's part is so unusual as to render deference to her judgment inappropriate. As we noted above, the district court in this case found that plaintiffs were likely to succeed on the merits of their argument that the Secretary is deliberately flouting the law she is required to apply. Because there is no doubt what this court says the Secretary must do, she must expect that all her terminations ignoring *Patti* and *Finnegan*, will, if challenged, be reversed by all district courts within this circuit. Only procedural flaws in claimants' challenges offer her any hope of success in such courts. Thus, as we noted above, the Secretary appears to be using the procedural requirements as a mechanism for evading the law she is required to apply. In extraordinary cases involving bad faith on the part of the Secretary, the Secretary's interest in administrative efficiency should give way to the claimants' interest in adequately preparing their cases, an interest that, as we have seen, is not adequately protected by the 60-day limitation in cases such as this one.

Finally, we believe that, even if the limitations period is applicable, the number of class members whose claims would be time-barred is substantially smaller than the Secretary suggests. In the analogous Title VII context, the statute of limitations is deemed tolled retroactively for all unnamed class

members as of the time the class representative filed his administrative charge with the EEOC. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 923 (9th Cir.), *cert. denied*, 103 S. Ct. 302 (1982); *Inda v. United Air Lines, Inc.*, 565 F.2d 554, 559 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978); *see also* B. Schlei & P. Grossman, *Employment Discrimination Law* 1263 (2d ed. 1983). The statute is tolled even if the administrative charge was not filed on behalf of a class. *See Inda, supra.* The class representative's administrative complaint has that effect because when an employer acts in a way that affects an entire class in an identical manner, he cannot be heard to claim surprise over suits by the other employees. Because the individual administrative complaint should be adequate to give notice of the class-wide grievance, the purposes behind the time limitation are served by tolling the statute in that situation. *See Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-20 (7th Cir. 1969), *cited with approval in Albemarle*, 422 U.S. at 414 n.8.

In this case, the Secretary has similarly acted in a way that affects an entire class in an identical fashion. Certainly the Secretary should have known that terminations made pursuant to her policy of refusing to follow decisions of this court would be challenged by the large number of people adversely affected by that policy. As in the Title VII situation, the filing of an individual administrative complaint under such circumstances should suffice to give notice that a class-wide dispute is involved. The Secretary should not now be heard to express surprise at the number of people challenging her ruling. We thus

conclude that there is a strong possibility that plaintiffs will succeed in their argument that, in a section 405(g) class action, the limitations period is deemed tolled retroactively for unnamed class members from the date a class representative first files an administrative appeal.

B. *Mandamus Jurisdiction.*

Plaintiffs argue that the federal mandamus statute provides an alternative basis for jurisdiction over this case. In considering the Secretary's motion for a stay pending appeal, we did not find it necessary to consider the availability of mandamus jurisdiction. When the Secretary sought a stay in the Supreme Court, plaintiffs relied only on the grounds set forth in our decision. Thus, none of the opinions of the Justices of the Supreme Court considered the mandamus issue. Because plaintiffs properly rely on the mandamus statute as an alternative basis for jurisdiction, we consider the issue now.

The mandamus statute provides that

> [t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1361 (1976). The Secretary argues that 42 U.S.C. § 405(g) precludes reliance on bases of jurisdiction other than 42 U.S.C. § 405(g). Section 405(h) reads, in relevant part, as follows:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28

> to recover on any claim arising under this subchapter.

42 U.S.C. § 405(h) (1976). Although the statute's language would appear not to preclude jurisdiction based on section 1361, the Secretary argues that the Supreme Court has held that jurisdiction over benefits claims may be based only on section 405(g). We disagree.

The cases cited by the Secretary all hold that section 405(g) precludes jurisdiction based on the general federal question statute, 28 U.S.C. § 1331 (1976 & Supp. 1981). When presented with the argument that mandamus jurisdiction is similarly unavailable, the Court has consistently reserved the question. *See Eldridge*, 424 U.S. at 332 n.12; *Norton v. Mathews*, 427 U.S. 524, 529-30 (1976); *Califano v. Yamasaki*, 442 U.S. 682, 697-98 (1979). We have held, however, that mandamus jurisdiction is available in cases challenging the procedures used in administering social security benefits. *See Ringer v. Schweiker*, 697 F.2d 1291 (9th Cir. 1982), *cert. granted sub nom. Heckler v. Ringer*, 103 S. Ct. 3535 (1983); *Daniel H. Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473 (9th Cir. 1981); *Knuckles v. Weinberger*, 511 F.2d 1221 (9th Cir. 1975). In this regard, we are in accord with other circuits that have considered the question. *See Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981); *Martinez v. Richardson*, 472 F.2d 1121 (10th Cir. 1973). Our holding is also supported not only by the plain language of section 405(g), but also by Congress's failure, in amending other jurisdictional provisions, to express disapproval of the cases finding mandamus jurisdiction available under such circumstances. *See Ellis v. Blum*, 643 F.2d at 80.

The mandamus statute gives the district courts jurisdiction to entertain "actions in the nature of mandamus." 28 U.S.C. § 1361 (1976). This requirement has been read to incorporate the common law requirements for granting mandamus, i.e., (1) that the plaintiff have a plain right to have the act performed, (2) that the defendant have a plain duty to perform it, and (3) that there be no other adequate remedy available to the plaintiff. *See Kennecott Copper Corp., Nevada Mines v. Costle*, 572 F.2d 1349, 1356 (9th Cir. 1978); *see generally*, 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.62[17] (2d ed. 1982). Here, the first two requirements are clearly satisfied: the Secretary's duty to perform the sought-after act was made plain in *Patti* and *Finnegan*, and, because all plaintiffs have had their benefits terminated as a result of the Secretary's failure to perform the act, each has a plain right to have the act performed. The only remaining question with respect to the availability of mandamus is whether plaintiffs have another adequate remedy. While we believe that it is likely that plaintiffs have an adequate remedy under section 405(g), our view is based on the assumption that the 60-day limitation on the filing of suits is inapplicable. If, however, the 60-day period does apply to each of the class members individually, we believe that, for the reasons previously discussed, the remedy would be inadequate and mandamus jurisdiction would be fully available as an alternative basis of jurisdiction.[16]

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[16] The Secretary does not question the timeliness of plaintiffs' assertion of mandamus jurisdiction. In any event, mandamus, like other equitable remedies, must be sought with "reasonable promptness." *See United States v. DeLoach*, 654

III. *SOVEREIGN IMMUNITY*

The Secretary claims that the district court lacked authority to award the preliminary relief awarded here because she is shielded by sovereign immunity. She argues that "a court may not award monetary relief against the federal government absent a congressional enactment waiving the United States' sovereign immunity." She points out that the only statute authorizing payment of the type of benefits awarded here permits payment only upon a "final decision" by the Secretary or "final judgment" by a court that a person is "entitled" to benefits. 42 U.S.C. § 405(i) (1976). Because the requirements set out in the statute were not satisfied, she argues, the relief given was inappropriate.

The Secretary's argument that the preliminary relief awarded here is inconsistent with the dictates of section 405(i) is without merit. Section 405(i) authorizes payment of benefits "[u]pon final judgment of any court of competent jurisdiction, that any person is entitled to" benefits. 42 U.S.C. § 405(i) (1976). Because each of the persons afforded relief by the preliminary injunction had been receiving benefits before the challenged action of the Secretary, each had received a "final decision" from the Secretary that he was "entitled to" benefits. Each is challenging the action of the Secretary revoking the earlier final decision. The district court's injunction merely instructs the Secretary to reinstate that earlier final decision pending determination of the validity of the revocation. The payments are thus indeed

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F.2d 763 (D.C. Cir. 1980) (unexplained delay of four years precludes mandamus jurisdiction). All of the plaintiffs' claims were brought reasonably promptly given the nature of the claims asserted.

being made pursuant to a "final decision" of the Secretary.

The court's power preliminarily to reinstate that "final decision" by interdicting enforcement of the otherwise superseding later decision is plainly encompassed in the federal court's traditional equitable power to grant preliminary relief. It is hornbook law that "[t]he general purpose of a preliminary injunction is to preserve the status quo pending final determination of the action after a full hearing." 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 65.04 [1] at 65-36 (2d ed. 1983). It is similarly well accepted that "[t]he status quo is the last uncontested status which preceded the pending controversy." *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958); *see National Association of Letter Carriers v. Sombrotto*, 449 F.2d 915, 921, 924 (2d Cir. 1971); *District 50, United Mine Workers of America v. International Union, United Mine Workers of America*, 412 F.2d 165, 168 (D.C. Cir. 1969); *Minnesota Mining and Manufacturing Co. v. Meter*, 385 F.2d 265, 273 (8th Cir. 1967); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963); *Warner Brothers Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940). A contrary rule would predicate a claimant's entitlement to preliminary relief on his having learned of the contested act sufficiently in advance to be able to file a lawsuit and seek a restraining order. It would also allow persons to shield themselves from equitable claims simply by presenting potential disputants with *faits accomplis*. Because section 405(i) evinces no congressional intent to limit the traditional equitable power of the courts to grant preliminary relief if the

moving party is likely to succeed on the merits and would suffer irreparable injury without the relief, we must conclude that the preliminary injunction granted here was a proper exercise of the district court's equitable discretion.[17]

The Secretary cites the recent enactment of an amendment to the Social Security Act, 42 U.S.C. § 1395, 96 Stat. 2497 (1983), as support for the proposition that the law did not authorize courts to award interim benefits pending adjudication of a section 405(g) claim to persons whose benefits were terminated before January 12, 1983. The Secretary argues that that amendment, entitling persons who are challenging termination of their benefits to continued benefits during their appeals, was designed to

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[17] Justice Rehnquist appeared troubled by the fact that, under the injunction, "the Secretary's obligation to pay is triggered merely by the recipient's statement in his application that, in his subjective belief, his medical condition has not improved since the earlier determination." *Heckler v. Lopez*, 104 S. Ct. at 14. We agree that a mere application for benefits would be an insufficient basis for a court order directing the payment of benefits. Here, however, the district court's power to order reinstatement of class members' benefits derives not from the application but from the Secretary's own final decision, which the district court has found likely to have been improperly revoked. As we have already seen, the court's traditional equitable powers include the power preliminarily to interdict enforcement of the terminations, and thus to reinstate the benefits of *all* the class members, if the traditional requirements for preliminary relief are met. If the court could have reinstated the benefits of all class members, then the court's injunction can be no less valid because it granted that relief only to those who subsequently filed an application stating that they were still disabled. The application procedure outlined in the injunction thus serves as a limiting device, not as the source of the court's authority to order the resumption of benefits payments.

cure a defect that Congress perceived in prior law. That defect, the Secretary argues, was the absence of authority to award the type of benefits awarded here. Because the amendments apply only to persons whose benefits were terminated after January 12, 1983, she continues, the court was without authority to award the preliminary relief it awarded.

The Secretary's argument is flawed in two respects. First, the amendment she refers to applies not only to persons whose benefits were terminated after January 12, 1983, but also to persons whose benefits were terminated before that date and who have sought administrative review under section 221 (d) of the Social Security Act. Because the administrative exhaustion requirement was waived in this case, this latter requirement should be deemed satisfied as well. More fundamentally, however, the amendments were not at all designed to address the problem of courts lacking power to grant preliminary relief. The amendment only entitles claimants to interim benefits pending *administrative* review. *See* 42 U.S.C. § 1395, 96 Stat. 2498 (1983). Congress's enactment of a law entitling claimants to interim benefits pending their administrative appeal does not in any way suggest that it believed courts lacked the power to reinstate benefits pending judicial review in cases otherwise satisfying the requirements for preliminary relief. To the contrary, it suggests that Congress believed that the existing scheme, which permitted judicial intervention only upon a "final decision" of the Secretary, left claimants challenging terminations without sufficient recourse during their administrative appeals.

Neither would sovereign immunity be a bar to the exercise of jurisdiction under the mandamus statute.

In 1976, Congress amended section 702 of the Administrative Procedure Act to provide specifically that

> [a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1982). That clearly constitutes a consent to be sued in cases such as this. Plaintiffs here were awarded preliminary injunctive relief, not damages. The district court made it clear that it was awarding only prospective relief; the preliminary injunction does not even order payment to the class members of the benefits that they will have failed to receive between the time they were terminated and the time the Secretary reinstates the benefits pursuant to the injunction. Although section 702 does go on to provide that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," *id.*, as we have seen, nothing in the Social Security Act forbids the type of equitable relief awarded here. Sovereign immunity thus presents no obstacle to the availability of mandamus as an alternative basis for jurisdiction.

CONCLUSION

Because we see no basis for awarding relief to claimants who had received final decisions on their terminations before *Patti* and *Finnegan* were decided, we vacate the preliminary injunction granted by the district court insofar as it applies to *Finnegan*-type claimants who had received final decisions on their terminations before August 25, 1981, and *Patti*-type claimants who had received final decisions on their terminations before August 30, 1982. With regard to all remaining plaintiffs, however, we affirm the preliminary injunction. We conclude that section 405(g)'s presentation requirement was satisfied, that it is likely (a) that section 405(g)'s exhaustion requirement was properly waivable, (b) that its 60-day limitation was probably inapplicable in this case, and (c) that, in any event, the limitation was tolled for most, if not all, class members. We also conclude that, if plaintiffs do not prevail under section 405(g), they will prevail under the mandamus statute. Finally, we conclude that the relief awarded was fully consistent with the requirements of section 405(i) and therefore not barred by sovereign immunity. *A fortiori*, therefore, we conclude that plaintiffs raise serious legal questions. Accordingly, we affirm the preliminary injunction, as modified above, in all respects.

AFFIRMED IN PART; REVERSED IN PART.

BOOCHEVER, Circuit Judge, concurring.

I concur generally in Judge Reinhardt's opinion and share his concern over the Secretary's refusal to obey the decisional law of this circuit. I cannot

agree, however, that a substantial question is presented as to whether claimants who received termination notices from the Secretary more than sixty days prior to commencement of this class action and failed to seek any review are time-barred by the sixty-day limitation of § 405(g). The district court had no jurisdiction under § 405(g) over those claimants. *See Heckler v. Lopez*, —— U.S. ——, 104 S. Ct. 221, 223 (1983) (Stevens, J., concurring in part and dissenting in part).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6126

D.C. No. 83-0697-WPG[T]

MARIO LOPEZ, ET AL., PLAINTIFFS-APPELLEES

vs.

MARGARET M. HECKLER, Secretary of Health and Human Services, ET AL., DEFENDANTS-APPELLANTS

[Filed Feb. 22, 1984]

ORDER

Before: PREGERSON, BOOCHEVER, and REINHARDT, Circuit Judges

The time for issuance of the mandate is hereby shortened to ten (10) days. If, within that period, appellee files a request for a stay with the Circuit Justice, the mandate shall not issue until such time as the Circuit Justice or the Supreme Court acts upon such request. No petition for rehearing or rehearing en banc will be entertained by the panel.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6126

D.C. No. 83-0697-WPG[T]

MARIO LOPEZ, ET AL., PLAINTIFFS-APPELLEES

vs.

MARGARET M. HECKLER, Secretary of Health and Human Services, ET AL., DEFENDANTS-APPELLANTS

Emergency Motion for a Partial Stay Pending Appeal of a Preliminary Injunction Ordered by the United States District Court for the Central District of California
Honorable William P. Gray, District Judge, Presiding

Decided August 24, 1983

[Filed Aug. 24, 1983]

OPINION AND ORDER

Before: PREGERSON, BOOCHEVER, and REINHARDT, Circuit Judges

REINHARDT, Circuit Judge:

The Secretary of Health and Human Services seeks a partial stay pending appeal of a preliminary injunction issued by the United States District Court for the Central District of California.[1] *See* Fed. R. App. P. 8(a); Ninth Circuit R. App. P. 6(h). The order requires the restoration of disability benefits to a large number of Social Security recipients. From 28,000 to 78,000 individuals may be eligible. We reject the Secretary's request for a stay and allow the preliminary injunction to stand.

BACKGROUND

The underlying dispute before the district court involves a class action[2] challenge to policies and procedures used by the Secretary in terminating Social Security disability benefits. *See* 42 U.S.C. §§ 401-431 (1976 and Supp. IV 1980) (Social Security Disability Insurance (SSDI) benefits for disabled workers); 42 U.S.C. §§ 1381-1383 (1976 and Supp. IV 1980) (Supplemental Security Income (SSI) benefits for

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[1] The Secretary also requested "in any event a temporary stay." We have previously denied that request.

[2] The district court certified as the plaintiff class those Supplemental Security Income and Social Security Disability Insurance recipients who live within the Ninth Circuit and "who have been or will be considered for termination after August 30, 1981, and SSI recipients under the 'grandfather clause' of the Social Security Act who have been or will be considered for termination after August 25, 1980, such consideration being or having been for the asserted reason that the claimant's disability had ceased" [footnotes omitted].

persons who are both poor and disabled). According to findings made by the district court, since March of 1981 the Social Security Administration has drastically increased the rate at which it reviews the status of persons receiving disability benefits.[3] As a result, the number of people who have had their benefits terminated annually has doubled—from 98,000 removed from the disability rolls in fiscal year 1981 to 195,474 terminated in fiscal year 1982.

Plaintiffs contend that the procedures used by the Secretary of Health and Human Services in terminating the benefits of disabled persons are in direct violation of two decisions of this court. In *Patti v. Schweiker*, 669 F.2d 582, 587 (9th Cir. 1982), and *Finnegan v. Matthews*, 641 F.2d 1340, 1345 (9th Cir. 1981), we held that before Social Security disability benefits can be terminated on the ground that the recipient is no longer disabled, the Secretary must introduce evidence that the recipient's medical condition has improved. The principal rationale underlying these decisions is that the Social Security Administration's initial determination of disability creates a presumption that the person remains disabled. To terminate benefits, then, the Secretary is "required to 'meet or rebut' " the presumption "with evidence that [the recipient's] condition has improved in the interim." *Patti*, 669 F.2d at 587. *See also Rivas v. Weinberger*, 475 F.2d 255, 252 (5th Cir. 1973) ("Once evidence has been presented which supports a finding that a given condition exists it is presumed in the absence of proof to the contrary that the condition has remained unchanged.").

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[3] The district court found that in calendar year 1980, 185,639 Continuing Disability Investigations (CDIs) were conducted; in the fiscal year 1982, 435,262 CDIs were undertaken.

The Secretary of Health and Human Services subsequently announced that she "does not acquiesce" in and therefore would not follow this court's holdings in *Patti* and *Finnegan*.[4] *See* Social Security Rulings 82-10c and 82-49c. Instead, the Secretary has ordered that Social Security disability benefits be terminated on the ground of lack of disability regardless of whether the recipient's medical condition has improved since the time of the initial disability determination. *See* Social Security Ruling 81-6.

This policy was challenged by plaintiffs in district court. Plaintiffs' suit is framed in large part as a constitutional challenge to the policy of nonacquiescence. Plaintiffs argue that the policy violates the principles of separation of powers and *stare decisis* as well as their rights to due process and equal protection.

On June 16, 1983, in a thorough, careful, and well-reasoned decision, Senior District Judge William P. Gray granted plaintiffs' motion for a preliminary injunction. The court restrained the Secretary "[f]rom failing to follow, implement or accord precedential effect to" *Finnegan* and *Patti* and from implementing the nonacquiescence policy announced in Social Security Rulings 82-10c, 82-49c, and 81-6.

The Secretary did not seek to stay these aspects of the district court's order. Rather, the government requested that the following portion of the district court's injunction be stayed pending appeal:

> (c) (i) Within sixty (60) days following the date of this order, the defendants will notify

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[4] The Secretary did not seek Supreme Court review of our decisions in either *Patti* or *Finnegan*. The individual litigants in the two cases did, however, receive the relief mandated by this court.

(a) each class member who had been receiving Supplemental Security Income Disability benefits under 42 U.S.C. § 1382c(a)(3)(E), and who was terminated from such benefits after August 25, 1980, and (b) all other persons who have been terminated from either Title II social security disability insurance or Title XVI Supplemental Security Income Disability after August 30, 1981, for the purported reason that his or her disability had ceased, whether or not such person has appealed, that:

> Such person may apply for reinstatement of benefits if he or she believes that his or her medical condition has not improved following the granting of disability benefits.

(ii) Upon receiving such application, the defendants will forthwith reinstate and pay benefits in the monthly amounts such person would have been receiving had his or her benefits not been interrupted.

(iii) Following such reinstatement, if the defendants or their agents or employees conduct a disability investigation or other screening of such person, they will apply the standards set forth in *Patti v. Schweiker* and *Finnegan v. Matthews* and, if they conclude that such person's medical condition has improved and he or she is no longer disabled, they will identify the evidence relied upon to reach that conclusion.

(iv) Following such review, persons who are notified of an initial determination that their benefits shall cease shall be given an opportunity to contest the determination and pending such review, they shall continue to receive aid as provided in current laws and regulations.

The Secretary's request for a partial stay and for a temporary stay, characterized by the government as an "emergency motion," was filed on Thursday, August 11, 1983—56 days after the district court issued the preliminary injunction and only four days before the Monday on which the Secretary was required to notify terminated recipients of their eligibility for reinstatement. This court received the lengthy papers and record in this case on Friday, August 12, 1983. On Saturday, August 13, we issued a six page order rejecting the Secretary's request for a temporary stay and declining to act "on an emergency basis" on the request for a partial stay. Our decision was based in part on the fact that the requirement that terminated recipients be notified by August 15, 1983 of their potential eligibility for benefits was the only immediate obligation imposed upon the government. We reasoned that the bulk of the administrative costs and the cost of reinstating benefits—the source of the injury which the Secretary argues justifies a stay—would not start to accrue until later, when the former recipients begin reapplying for benefits. Thus, we saw no necessity to issue a temporary stay or to grant a partial stay pending appeal on an "emergency" basis—especially given the Secretary's unexplained delay in seeking such relief.

On Monday, August 15, 1983, the Secretary, in compliance with paragraph (c)(i) of the district court's order, notified 28,557 members of the plaintiff class of their eligibility to reapply for disability benefits. The issue remaining before us is whether the Secretary must now comply with the remainder of paragraph (c). In other words, while the appeal from the preliminary injunction order is pending, must the Secretary reinstate benefits to those dis-

abled persons who file applications, and may she then terminate those benefits only in accordance with the procedures required by our decisions in *Patti* and *Finnegan*?

STANDARD OF REVIEW

The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction. *See Nevada Airlines, Inc. v. Bond*, 622 F.2d 1017, 1018 n.3 (9th Cir. 1980). In this circuit there are two interrelated legal tests for the issuance of a preliminary injunction. These tests are "not separate" but rather represents "the outer reaches 'of a single continuum.'" *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. *Id. See also Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1134 (9th Cir. 1979). At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. *Los Angeles Memorial Coliseum Commission*, 634 F.2d at 1201; *Miss Universe*, 605 F.2d at 1134. "[T]he relative hardship to the parties" is the "critical element" in deciding at which point along the continuum a stay is justified. *Benda v. Grand Lodge of International Association of Machinists, etc.*, 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). In addition, in cases such as the one before us, the public interest is a factor to be strongly considered. *See Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir. 1977).

In this case, the Secretary seeks a stay pending appeal of a preliminary injunction. Therefore, in order to determine whether the Secretary has raised serious legal questions or whether she has shown a probability of success on the merits, we must evaluate her arguments for overturning the district court's preliminary injunction on appeal. As a general rule, we have held that an "order issuing or denying a preliminary injunction will only be reversed if the lower court abused its discretion or based its decision upon erroneous legal premises." *Los Angeles Memorial Coliseum Commission*, 634 F.2d at 1200.

DISCUSSION

I. *IRREPARABLE INJURY, THE BALANCE OF HARDSHIPS, AND THE PUBLIC INTEREST.*

The Secretary's contention that the government will suffer substantial hardship in the absence of a stay pending appeal is premised solely on the financial and administrative costs of reinstating disability benefits to former recipients. According to the Secretary, 28,557 terminated recipients were notified on August 15, 1983, of their eligibility to reapply for benefits. The government estimates that if every one of these former recipients reapplies for benefits, the total monthly cost of restoring benefits pending readjudication of claims will be $12,000,000. The government puts the total administrative cost of implementing the district court order at $10,300,000.[5]

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[5] These estimates are contained in the Secretary's amended declaration received by this court on August 17, 1983. The cost estimates previously supplied to the district court by the government were almost three times as high: the monthly

The district court's injunction will undoubtedly impose some burden on the government. Even if we accept the Secretary's estimates at face value, however, the government has not demonstrated that the balance of hardships tips in its favor.[6] On the con-

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cost of reinstating benefits was put at $32,000,000, and the total administrative cost was estimated at $28,000,000. Even considering these much higher cost estimates, the district court did not find that the disability insurance trust fund would be endangered by the issuance of a preliminary injunction or that the balance of hardships tipped in the government's favor.

[6] There are several reasons to believe that the Secretary's arguments regarding financial harm are somewhat exaggerated. To begin with, most of the increased administrative workload—the holding of hearings—will not occur automatically; rather, hearings will be necessary only in cases in which the Secretary believes that there is evidence that she can introduce to show an improvement in medical condition, and thus a proper basis for terminating benefits.

Second, there is no evidence in the record that the increased expenditures necessitated by the district court's order would imperil the Social Security trust fund. To the contrary, plaintiffs have presented evidence indicating that the trust fund for disability insurance is currently solvent and that the long-term actuarial predictions for the fund also indicate solvency.

Third, the government's cost estimates ignore the increased burden placed on state and local taxpayers by the Secretary's actions. According to one study presented by plaintiffs, 48% of those Supplemental Security Income recipients terminated in Michigan subsequently became eligible for other government-funded welfare programs, while 7% entered psychiatric facilities, 4% entered prisons or jails, 5% received outpatient mental health services, and 2% died. Similarly, New York state officials estimate that the Secretary's disability terminations would cost New York state and local governments $234 million annually in additional welfare costs as well as an extra $165 million annually in mental health care expenditures. The Secretary's estimates of harm to the taxpayer completely ig-

trary, we agree with the district court's conclusion that the balance of hardships in this case strongly favors plaintiffs.

Plaintiffs do not attempt to match in dollars and cents the monetary harms that will allegedly be suffered by the government. Yet the physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government. We find ample support for Judge Gray's persuasive finding "that some who have unexpectedly lost benefits have already suffered deprivation of life's necessities, further illness, or even death from the very disabilities that the Secretary deemed them not to have." Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.

We also consider it crucial that, because the members of plaintiffs' class are largely infirm and disabled, their resources and life spans are by definition extremely limited. Deprivation of benefits pending trial might cause economic hardship, suffering or

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nore these other costs. We seriously question whether the public interest is served in this case by merely shifting the tax burden from federal to state and local governments. *See, e.g., Leschniok v. Heckler*, Nos 82-5676 & 82-665, slip op. at 6, 8 (9th Cir. Aug. 18, 1983) (noting "a shift of the welfare burden from one program to another, from primarily federal to primarily state sources of funds," as a result of Social Security benefit terminations); *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157, 167 (D. Minn. 1982) ("There is no public interest in shifting financial responsibility for the psychiatrically disabled from a solvent disability fund to state and local government.").

even death. Retroactive restoration of benefits would be inadequate to remedy these hardships.[7] Following his thorough review of the record, Judge Gray reached a similar conclusion: "Retroactive relief [for plaintiffs] would be inadequate, and perhaps too late, to ensure that the purpose of Social Security disability benefits, i.e., provision of a minimum standard of living for the poor and disabled, will be served." *See also Leschniok v. Heckler*, Nos. 82-5676 & 82-6065, slip op. at 8 (9th Cir. Aug. 18 1983) ("We fail to comprehend the Secretary's argument that financial compensation at some future date, should the claimants survive and prevail, mitigates the hardship which is visited upon claimants and their families each and every day."); *Caswell v. Califano*, 583 F.2d 9, 14 (1st Cir. 1978) ("It is simply not true that a claimant for disability benefits, not infrequently in dire financial circumstances due to his disability, is truly made whole by retroactive payments which he has had to survive well over a year without." ; *Mental Health Association of Minnesota v. Schweiker*, 554 F. Supp. 157, 165-66 (D. Minn. 1982) ("[C]lass members who have been denied [disability] benefits or have had benefits terminated have suffered serious harms . . . [that] are not recompensable through a retroactive award of benefits.").

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[7] We also note, but do not place much emphasis on, the fact that the government will have the opportunity to recover benefits that were paid erroneously. The district court has expressly conditioned the receipt of reinstated benefits under the preliminary injunction on the Secretary's right to recoup such payments if the recipient is subsequently terminated in accordance with *Patti* and *Finnegan*. This may well be more of an illusory than a practical remedy. *Mathews v. Eldridge*, 424 U.S. at 347.

Here, the question of the public interest is inseparable from the issues relating to the relative hardship suffered by the litigants. Up to now, we have discussed the government's interest only in the narrowest terms—the administrative and financial impact of the preliminary injunction. For purposes of determining the relative hardship to the parties, it may be appropriate to do so—to judge the government's narrow interest in terms of its role as a litigant. In a broader sense, however, the government's interest is the same as the public interest. The government must be concerned not just with the public fisc but also with the public weal. In assessing this broader interest, we are not bound by the government's litigation posture. Rather, we make an independent judgment as to the public interest.

It is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required. It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time. It would be unfortunate, but far less harmful to society, were the government to succeed in overturning the preliminary injunction but be unable to recoup all or a portion of the funds.

In summary, the balance of hardships as between the litigants lies sharply in favor of the plaintiffs. When the public interest is included, that balance is overwhelming.

II. *PROBABILITY OF SUCCESS ON THE MERITS AND THE EXISTENCE OF SERIOUS LEGAL QUESTIONS.*

The Secretary makes two principal arguments regarding the merits of her appeal from the order granting the preliminary injunction. First, the Secretary attempts to defend her policy of "nonacquiescence" with federal court decisions. This defense, presented in a footnote to the government's brief, is far from persuasive. To begin with, other circuits that have considered the question have already rejected the Secretary's argument that a federal agency can legitimately ignore federal appeals court precedents. *See, e.g., Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980); *ITT World Communications v. FCC*, 635 F.2d 32, 43 (2d Cir. 1980); *Ithaca College v. NLRB*, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Mary Thompson Hospital, Inc. v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980); *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). *See also Chee v. Schweiker*, 563 F. Supp. 1362, 1364-65 (D. Ariz. 1983); *Siedlecki v. Schweiker*, 563 F. Supp. 43, 46-48 (W.D. Wash. 1983); *Hillhouse v. Harris*, 547 F. Supp. 88, 93 (W.D. Ark. 1982). Moreover, the cases cited by the Secretary to support her position appear to be inapposite. In short, our review of the relevant case law indicates that there is little chance that the Secretary will succeed in her argument that nonacquiescence is a legitimate policy, or, to put it more precisely, that she will persuade us that the district court committed a legal error in concluding that there was a strong probability that the plaintiffs would ultimately prevail on this fundamental issue.

Second, it should be obvious that, even if the Secretary's issuance of nonacquiescence rulings regarding *Finnegan* and *Patti* does not violate the Constitution, each of her department's decisions based on those rulings will be rejected summarily whenever challenged in this circuit. We see little chance that the Secretary will convince this Court to the contrary.[8]

The majority of the Secretary's attention is devoted to her second argument: that the district court improperly exercised jurisdiction over some members of plaintiffs' class. The district court premised its jurisdiction on 42 U.S.C. § 405(g), which provides a limited avenue of judicial review upon the filing of a complaint within 60 days of a final decision of the Secretary.[9]

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[8] The Secretary also argues that her nonacquiescence rulings issued after the decisions in *Patti* and *Finnegan* constitute superceding regulations to which this Court should defer. Because the *Patti* and *Finnegan* decisions were not based in any way on particular Health and Human Services regulations, we do not think the Secretary is likely to prevail on this argument.

[9] There may be a basis for the district court's jurisdiction other than § 405(g). Plaintiffs claim that 28 U.S.C. § 1361 (1976) provides an independent basis for such jurisdiction. Section 1361 gives the district court "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." We have recently held that section 1361 offers "an independently adequate ground for jurisdiction" in a case dealing with a "constitutional challenge" to the illegal termination of social security disability insurance benefits. *Leschniok v. Heckler*, Nos. 82-5676 & 82-6065, slip op. at 5 (9th Cir. Aug. 18, 1983). *See also Elliot v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), *aff'd in part, rev'd in part on other grounds sub nom., Califano v. Yamasaki,*

In order to satisfy the section 405(g) requirements, plaintiffs must overcome several procedural obstacles. First, plaintiffs must have presented a claim for benefits to the Secretary. Contrary to the Secretary's assertion, there is substantial authority for the proposition that this requirement is satisfied once the Secretary has had an opportunity to act and benefits have actually been terminated. *See Ellison v. Califano*, 546 F.2d 1162, 1164 (5th Cir. 1977).

The second requirement under section 405(g) is that a final decision must have been made by the Secretary. This requirement may be waived by the Secretary or excused or deemed complied with by the court. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 328 (1976); *Jones v. Califano*, 576 F.2d 12, 18-19 (2d Cir. 1978); *Liberty Alliance for the Blind v. Califano*, 568 F.2d 333, 346 (3rd Cir. 1977). Some of the named plaintiffs and an unknown number of the plaintiff class have exhausted all administrative remedies and obtained final decisions; these plaintiffs indisputably are properly before the district court. The Secretary argues, however, that there is no jurisdiction over the other plaintiffs. The district court evaluated the Secretary's arguments and de-

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442 U.S. 682 (1979). Plaintiffs contend that, in light of the Secretary's flagrant noncompliance with *Patti* and *Finnegan*, mandamus is appropriate because "the claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Elliot v. Weinberger*, 564 F.2d at 626. Plaintiffs also contend that section 1361 jurisdiction exists because they are making a constitutional challenge to the procedures used by the Secretary rather than seeking the payment of benefits, citing *Ringer v. Schweiker*, 697 F.2d at 1294, 1296. Since the district judge found jurisdiction under § 405(g), he did not find it necessary to consider or resolve the section 1361 question.

cided that the plaintiffs' failure to exhaust their administrative remedies was excusable because it would have been futile to require plaintiffs to pursue administrative remedies in the face of the Secretary's announced policy of nonacquiescence. The district court's analysis finds strong support in two decisions that were thoroughly considered and discussed by Judge Gray in his opinion: *Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975); and *Ringer v. Schweiker*, 697 F.2d 1291 (9th Cir. 1983), *cert. granted*, 103 S. Ct. 3535 (June 27, 1983).

There is much additional support for the district court's conclusion that the section 405(g) exhaustion requirement does not apply in this case. First, plaintiffs have raised constitutional challenges to the Secretary's nonacquiescence policies. The Second Circuit has held that the exhaustion requirement should be waived where constitutional challenges similar to the ones in this case are raised. *See Jones v. Califano*, 576 F.2d at 18-19. *See also Mathews v. Eldridge*, 424 U.S. at 330 ("It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required to even consider such a challenge."). Second, the Third Circuit has decided that, even as to statutory rather than constitutional issues, the exhaustion requirement can be waived whenever the Secretary has taken a "final position" on a question. *See Liberty Alliance for the Blind v. Califano*, 568 F.2d at 346 ("The test for exhaustion of a statutory issue in an individual case . . . should be whether the Secretary has taken a final position on that issue. In the class context the test should be no different.").

See also Jones v. Califano, 576 F.2d at 19 (waiver of exhaustion requirement when "the Secretary had had ample opportunity . . . to modify his position.").

Finally, the district court emphasized the obvious undesirability, as well as the due process and equal protection implications, of the dual system of benefit review created by the Secretary's nonacquiescence policy. As the district court noted,

> [t]he policy of nonacquiescence announced by the Secretary creates two standards governing claimants whose disability benefits are terminated as a result of such nonacquiescence. If such a claimant has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced in *Patti* and *Finnegan*. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources, health and prospective longevity are, by definition, relatively limited, such a dual system of law is prejudicial and unfair.

The Second Circuit expressed a similar view in *Jones v. Califano*, 576 F.2d at 19.[10]

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[10] *Jones* involved a conflict between the Secretary and the Department's Appeals Council. Despite the fact that the Appeals Council had ruled repeatedly in favor of the claimants, the Secretary continued to adhere to a disapproved regulation. The Second Circuit held that the exhaustion requirement need not be met in light of the Secretary's refusal to

The third requirement under section 405(g) is that plaintiffs' appeals must have been brought within 60 days of the Secretary's final decision. The Secretary argues that all decisions not challenged within 60 days are unappealed and thus have a *res judicata* effect in later proceedings. Because the 60-day requirement can be waived by the parties, *Mathews v. Eldridge*, 424 U.S. at 328 n.9 (1976); *Weinberger v. Salfi*, 422 U.S. at 763-64, it need not be taken into consideration on appeal if not raised before the district court. *Id. See also Rowland v. Califano*, 588 F.2d 449 (5th Cir. 1979). There is no indication in the record currently before us that the 60 day requirement was raised by the Secretary below; nor is there any mention of the requirement in the district court's decision. In any event, the administrative *res judicata* bar is ordinarily not applied when an agency's decision is challenged on constitutional grounds. *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

In a recent decision cited in a footnote in the government's brief, the Second Circuit dismissed, for lack of jurisdiction, a class action complaint filed by persons whose disability benefits had been terminated. *Smith v. Schweiker*, 709 F.2d 777 (2d Cir. 1983). The disabled persons argued, *inter alia*, that specific evidence of medical improvement was required before benefits could be terminated. In *Smith*, however, all the named individuals had successfully appealed their terminations and were actually receiving

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change his policy. This case was remanded so that the district court could consider the propriety of class-wide relief and thus avoid "two standards of benefit calculation, one for claimants who seek review by the Appeals Council and one for claimants who do not." 576 F.2d at 19.

the benefits in question at the time of the litigation. Moreover, no constitutional challenge similar to that made by plaintiffs here was raised. While the government may take some comfort from some of the analysis and comments contained in the Second Circuit's opinion, and while the opinion may have the effect of limiting *Jones v. Califano, supra*, to some extent, *Smith* appears unlikely to affect significantly our view of the issues before us.[11]

Although the Secretary may have raised "serious legal questions," she has failed to make a showing of probability of success on the merits. Considered both individually and collectively, the Secretary's arguments do not persuade us that there is a probability that this court will reverse the district court's decision to grant a preliminary injunction.

CONCLUSION

The Secretary has the weaker position on both aspects of the interrelated test governing stays. The balance of hardships tips sharply toward the plaintiffs, even without including the public interest factor, and it is not probable that the Secretary will succeed on the merits of her appeal from the order granting a preliminary injunction. Finally, the public interest strongly supports denial of the stay.

The request for a partial stay is DENIED.

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[11] The Secretary also contends that the district court's preliminary injunction awards retroactive relief to plaintiffs and thus improperly "grants the plaintiffs all the affirmatives relief sought." We disagree. The district court's order does not award any retroactive benefit payments. As the court said, "[i]t would be inappropriate to grant such an award at this juncture . . . because this controversy has not been fully litigated and the plaintiffs have not requested such relief."

PREGERSON, Circuit Judge, concurring.

I concur completely in Judge Reinhardt's opinion. I write separately only to emphasize my concern over the Secretary's avowed policy of nonacquiescence with Ninth Circuit law as enunciated in *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), and *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981). The Secretary's ill-advised policy of refusing to obey the decisional law of this circuit is akin to the repudiated pre-Civil War doctrine of nullification whereby rebellious states refused to recognize certain federal laws within their boundaries. The Secretary's nonacquiescence not only scoffs at the law of this circuit, but flouts some very important principles basic to our American system of government—the rule of law, the doctrine of separation of powers imbedded in the constitution, and the tenet of judicial supremacy laid down in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The government expects its citizens to abide by the law—no less is expected of those charged with the duty to faithfully administer the law.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6126

D.C. No. 83-0697-WPG[T]

Central Dist. of California

MARIO LOPEZ, ET AL., PLAINTIFFS-APPELLEES

vs.

MARGARET M. HECKLER, Secretary of Health and Human Services, ET AL., DEFENDANTS-APPELLANTS

[Filed Aug. 18, 1983]

ORDER

Before: Pregerson and Reinhardt, Circuit Judges.

On August 11, 1983, the Secretary of Health and Human Services filed an emergency motion for a partial stay pending appeal from a federal district court order entered June 16, 1983. She also seeks "in any event a temporary stay." F.R. App. P. 8(a); Ninth Circuit R. App. P. 6(h). The standard for evaluating stays pending appeals is similar to that employed by district courts in considering whether to grant a preliminary injunction *See Nevada Airlines,*

Inc. v. Bond, 622 F.2d 1013 (9th Cir. 1980). Consequently, a stay pending appeal is appropriate when there is a strong likelihood of success on the merits and possible irreparable injury, or when serious questions are presented and the balance of hardships tips sharply in the movant's favor. *See Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). "These are not separate tests but the outer reaches 'of a single continuum.' *Benda*, supra, 584 F.2d at 315." *Id.* In cases like the one before us, the public interest also is a factor to be strongly considered. *See Warm Springs Dam Task Force v. Gribble*, 596 F.2d 549, 551 (9th Cir. 1977). Here, success on the merits means success on appeal from the order granting the preliminary injunction rather than success on the merits of the underlying case. "An order issuing or denying preliminary injunction will normally be reversed only if the lower court abused its discretion or based its decision upon erroneous legal premises." *Los Angeles Memorial Coliseum Comm'n*, 634 F.2d at 1200.

The underlying dispute in this case concerns a class action challenge to the procedures used by the Secretary of Health and Human Services for terminating Social Security disability benefits. *See* 42 U.S.C. §§ 401-431. (Social Security Disability Insurance benefits for disabled workers); 42 U.S.C. §§ 1381-1383(c). (Supplemental Security Income disability benefits for persons who are both poor and disabled). The district court's June 13, 1983 order granted plaintiffs' motion for a preliminary injunction. The government seeks a stay pending appeal of the following aspect of that order:

(c) (i) *Within sixty (60) days following the date of this order, the defendants will notify* (a) each class member who had been receiving Supplemental Security Income Disability benefits under 42 U.S.C. § 1382(a)(3)(E), and who was terminated from such benefits after August 25, 1980, and (b) all other persons who have been terminated from either Title II social security disability insurance or Title XVI Supplemental Security Income Disability after August 30, 1981, for the purported reason that his or her disability had ceased, whether or not such person has appealed, that:

> Such person may apply for reinstatement of benefits if he or she believes that his or her medical condition has not improved following the granting of disability benefits.

(ii) Upon receiving such application, the defendants will forthwith reinstate and pay benefits in the monthly amounts such person would have been receiving had his or her benefits not been interrupted.

(iii) Following such reinstatement, if the defendants or their agents or employees conduct a disability investigation or other screening of such person, they will apply the standards set forth in *Patti* v. *Schweiker* and *Finnegan* v. *Matthews* and, if they conclude that such person's medical condition has improved and he or she is no longer disabled, they will identify the evidence relied upon to reach that conclusion.

(iv) Following such review, persons who are notified of an initial determination that their benefits shall cease shall be given an opportunity to contest the determination and pending such

> review, they shall continue to receive aid as provided in current laws and regulations.

(Emphasis added.)

The government argues that a decision is required by Monday, August 15, the sixteenth day after the issuance of the district court's order, and that its motion for a stay must be decided on an emergency basis. We note, however, that while the district court's order was issued on June 16, 1983, the Secretary's motion for a stay was not filed until Thursday, August 11—56 days later, and the moving papers were not received by the judges authorized to act until Friday, August 12. In fact, on Friday we received voluminous materials from the parties that we have not yet had an opportunity to review thoroughly. In light of its characterization of this situation as an "emergency," the government's lack of an explanation for its delay in requesting a stay is disturbing.

Moreover, the only portion of the district court's order that must be implemented by Monday is the requirement that the Secretary notify each qualifying member of plaintiffs' class that "[s]uch a person may apply for reinstatement of" Social Security disability benefits (subparagraph (c)(i) [*sic*]. Thus, the only immediate obligation imposed on the Secretary is that such notifications be made. Neither the bulk of the administrative costs complained of nor the actual reinstatement of benefit payments will begin until the class members complete their applications and submit them to the Secretary. These matters are covered in subsequent portions of the district court's order.

Given the government's apparent delay in filing its motion and the fact that notification is the only

action that must be performed immediately, we find no justification for issuing a stay pending appeal on an emergency basis or issuing a temporary stay.

Almost all of the harms that the government will allegedly suffer derive from the actions it must take once the benefit applications are filed. There is no allegation that the simple requirement that qualified plaintiffs be notified will cause the government either irreparable injury or substantial hardship. On the other hand, the record indicates that plaintiffs' class is likely to suffer substantially from any delay at this stage of the proceedings. That class is largely composed of those who are ill and disabled, and, as the district court noted, "whose resources, health and prospective longevity are, by definition, relatively limited." The district court found "that some who have unexpectedly lost benefits have already suffered deprivation of life's necessities, further illness, or even death from" their disabilities. A delay in the implementation of the district court's order that qualified plaintiffs be notified of their eligibility to reapply for benefits could well result in suffering that would prove to have been totally unjustified should plaintiffs ultimately prevail.

As noted, the principal aim of the government's motion for a stay is to prevent the expenditure of funds that will occur once the benefits applications are received. These expenditures are required as a result of subparagraphs c(ii) (iii) and (iv) of the district court's order. The full motions panel will proceed rapidly to evaluate the merits of the Secretary's motion.

We fully expect to decide, prior to the time when the government must begin to comply with subparagraphs c(ii) (iii) and (iv) of the district court's

order, whether a stay pending appeal is appropriate. In the meantime, in our opinion, the mailing of the notices in compliance with subparagraph c(i) of that order is clearly in the public interest.

We thus decline to act on an emergency basis on the Secretary's request for a stay pending appeal. We will, however, give immediate attention to that request and issue a decision promptly. We deny the request for a temporary stay.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 83-0697-WPG(T)

MARIO LOPEZ, ET AL., PLAINTIFFS

v.

MARGARET M. HECKLER, ET AL., DEFENDANTS

[Filed Jun. 16, 1983]

MEMORANDUM OF DECISION

This is a proposed class action against the Secretary of Health and Human Services and the Commissioner of the Social Security Administration, challenging procedures used in terminating Social Security disability benefits.[1] The plaintiffs are

[1] At issue here are two kinds of social security disability benefits. Title II of the Social Security Act established disability insurance benefits for disabled workers, 42 U.S.C. § 401, *et seq.* (SSDI). These benefits are based upon the individual's earnings record and are paid without regard to financial need.

Title XVI of the Social Security Act created Supplemental Security Income Disability benefits for persons who are both poor and disabled, 42 U.S.C. § 1381, *et seq.* (SSI). SSI bene-

twenty assertedly disabled individuals and fourteen organizations, the former bringing suit on behalf of themselves and those similarly situated. Eighteen of the plaintiffs also seek to have the terminations of their individual benefits reversed pursuant to 42 U.S.C. § 405(g). The plaintiffs have filed motions for vacation of reference to the magistrate, class certification and preliminary injunction; the defendants have filed a motion to dismiss for lack of jurisdiction. The defendants' motion is denied and the plaintiffs' motions are granted, as set forth in the terms of the order filed with this memorandum.

Beginning in March 1981, the Social Security Administration (SSA) noticeably accelerated the rate at which it reviews the disability status of those receiving disability benefits. In the calendar year 1980, 185,639 Continuing Disability Investigations (CDIs) were conducted;[2] in the fiscal year 1982, 435,262 CDIs were conducted.[3] It would appear that the acceleration of the review process resulted in a

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fits are paid to eligible poor persons whose income and resources fall below a specified level. Disability recipients whose SSDI benefits are less than the monthly SSI benefit level in a particular state are also eligible to receive partial SSI benefits to supplement their SSDI benefits.

[2] C. Pepper, Impact of the Accelerated Review Process on Cessations and Denials in the Social Security Disability Insurance Program, 97th Cong., 2d Sess. (1982), *reprinted in Social Security Disability Insurance Program: Cessations and Denials: Hearing Before the House Select Committee on Aging*, 97th Cong., 2d Sess. 3 at 10 (1982).

[3] Letter from Paul B. Simmons, Deputy Commissioner for Programs and Policy, Social Security Administration to Senator John Heinz, responding to questions from Senator Heinz submitted on April 12, 1983 (Plaintiff Reply Brief, Exhibit Z).

dramatic increase in terminations. In fiscal year 1982, 195,474 beneficiaries were removed from the disability rolls, as compared with 98,800 terminated in fiscal year 1981.[4]

In two recent opinions, the Court of Appeals of this circuit held that before disability benefits may be terminated for lack of disability, the Secretary must produce evidence showing improvement in the recipient's medical condition. *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982)[5] and *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981).[6] The

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[4] *Id.*

[5] In *Patti*, SSI disability benefits were terminated and the plaintiff challenged such termination on the grounds that the decision was not based on substantial evidence, that her procedural rights were abused, and that the termination resulted from illegal use of social security regulations as a substitute for an individualized inquiry into her disability. The Court of Appeals reversed the district court's affirmance of termination, holding that the initial decision that plaintiff was disabled gave rise to a presumption that she still was disabled. 669 F.2d at 587. The court ruled that the Secretary, in terminating a recipient, must " 'meet or rebut' " the presumption with evidence that the recipient's medical condition has improved in the interim. *Id.* This presumption imposes upon the Secretary the burden of coming forward with evidence that a recipient's condition has changed, a burden that had not been met in that case. *Id.*

[6] In *Finnegan*, a recipient of SSI disability benefits under the "grandfather clause" of the Social Security Act challenged his termination. The grandfather clause, 42 U.S.C. § 1382c (a) (3) (E), provides that an individual shall be considered disabled if he is permanently and totally disabled as defined under an approved state plan, had received aid under such plan during a specified time in 1973, and so long as he is continuously disabled as so defined. The Court of Appeals held that the Secretary "may not terminate benefits absent a show-

Secretary has announced that she "does not acquiesce" in these decisions and has issued rulings to her subordinates, including administrative law judges, directing them not to act in accordance with these precedents.[7]

The plaintiffs challenge the constitutionality of the Secretary's policy of nonacquiescence on the grounds that it violates the principles of Separation of Powers and *stare decisis*, as well as the plaintiffs' right to due process. The Government denies that the policy of nonacquiescence is illegal and contends that the effect of the nonacquiescence rulings is merely to preserve the Secretary's right to ask the courts of appeals, and possibly the Supreme Court, to overrule decisions like *Patti* and *Finnegan* in appropriate cases.

This court notes that this litigation involves more than 42 U.S.C. § 405(g) claims and is a class action in which injunctive relief is requested. Since 28 U.S.C. § 636 does not empower magistrates to determine pretrial matters with respect to such actions, and since the parties agree that vacation of refer-

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ing of previous clear and specific error [in the initial determination] or medical improvement which is sufficient to establish that an applicant is no longer 'continuously disabled as so defined.' " 641 F.2d at 1345.

[7] SSR 82-49c states the SSA's nonacquiescence in *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982).

SSR 82-10c states the SSA's nonacquiescence in *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981).

SSR 81-6 directs that where the evidence obtained at the time of a continuing disability investigation establishes that the individual is not currently disabled or blind, a finding of cessation is appropriate, irrespective of whether or how much the individual's condition has medically improved since the prior favorable determination.

ence to the magistrate should be granted for the purpose of these motions, the vacation will be ordered.

With respect to the defendants' motion to dismiss for lack of jurisdiction, the court finds that this case fits within the exception to the exhaustion of administrative remedies requirement enunciated in *Weinberger et al. v. Salfi et al.*, 422 U.S. 749 (1975). There, the Supreme Court ruled that the three-judge district court did have jurisdiction to consider a constitutional challenge by some plaintiffs to certain Social Security eligibility requirements. Those plaintiffs had not exhausted the administrative processes by taking their grievances to an administrative law judge or the SSA's Appeals Council. The Court noted that formal exhaustion was not required there because the purposes of exhaustion—to prevent premature interference with agency processes and to provide the agency an opportunity to correct its own errors—had been served, once the Secretary "has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine . . . ." *Id.* at 765.

The Ninth Circuit Court of Appeals has noted that where a ruling by the Secretary, while "nominally leaving the administrative review process open for claims . . .," in effect makes the result of that process "both pre-ordained and immutable," the *Salfi* exception applies. *Ringer et al v. Schweiker*, 697 F.2d 1291, 1295 (9th Cir. 1982). The court noted that such a ruling "not only makes appeals futile . . . ," but also "indicates that the Secretary believes appeals are worthless to the Agency as well as to the claimant." *Id.* at 1295-6.

Here, in view of the Secretary's attitude, clearly enunciated in her ruling directing administrative law judges and the Appeals Council to ignore *Patti* and *Finnegan*, and not to apply a medical improvement standard in disability termination cases, appeals would indeed be futile. Thus, exhaustion of remedies would serve no useful purpose in this instance. Under the authority of *Salfi*, *supra*, and *Ringer*, *supra*, the defendants' motion to dismiss will be denied.

Regarding the plaintiffs' motions for class certification and for a preliminary injunction, the issues raised are inextricably intertwined with each other and with the merits of the plaintiffs' constitutional challenge. Our Court of Appeals has stated that to obtain a preliminary injunction the moving party must demonstrate "*either* a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Beltran et al. v. Meyers et al.*, 677 Fd 1317, 1320 (9th Cir. 1982) (emphasis in original). The plaintiffs have fulfilled both tests.

As to the first test, they have demonstrated probable success on the merits by making a strong argument that agencies are bound by the laws of the circuit. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule." This principle was laid down many years ago by Chief Justice Marshall in the landmark case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It has generally been accepted and acclaimed ever since, and it is the cornerstone of the doctrine of Separation of Powers that has served our country so well. Thus,

governmental agencies, like all individuals and other entities, are obliged to follow and apply the law as it is interpreted by the courts. The courts of appeals in other circuits categorically have denied the authority of a federal executive body to nonacquiesce in the law enunciated by our courts of appeals. *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979) (holding that a NLRB order predicated on the agency's disagreement with the Court of Appeals' interpretation of a statute is operating outside the law and thus unenforceable); *accord, Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) ("as must a district court, an agency is bound to follow the law of the circuit.").

In announcing the policy of nonacquiescence that is challenged here, the Secretary commented that in "many" instances the evidence on which disability was originally allowed "may not be available, or may not even exist." Such a circumstance would, indeed, make it very difficult, perhaps impossible, fully to apply the rule announced by the Court of Appeals in *Patti* and *Finnegan*. If such problems arise, as they occasionally may do, the obligation of the administrative body is to do the best that it can to proceed in harmony with the rule, and infer only such exception as is made by the facts in the particular case. But for the Secretary to make the general assertion that a decision of the Court of Appeals is not to be followed because she disagrees with it is to operate outside the law.

The policy of nonacquiescence announced by the Secretary creates two standards governing claimants whose disability benefits are terminated as a result of such nonacquiescence. If such a claimant has the determination and the financial and physical strength and lives long enough to make it through the ad-

ministrative process, he can turn to the courts and ultimately expect them to apply the law as announced in *Patti* and *Finnegan*. If exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources, health and prospective longevity are, by definition, relatively limited, such a dual system of law is prejudicial and unfair.

The plaintiffs have fulfilled the second requirement of the first test for preliminary injunction by showing that delay for the litigants creates a strong possibility of irreparable injury. The record shows that some who have unexpectedly lost benefits have already suffered deprivation of life's necessities, further illness, or even death from the very disabilities that the Secretary deemed them not to have. Retroactive relief would be inadequate, and perhaps too late, to ensure that the purpose of Social Security disability benefits, i.e., provision of a minimum standard of living for the poor and disabled, will be served.

As to the second test for preliminary injunction, the plaintiffs' claim that the Secretary's failure to abide by federal appellate precedents denies them due process of law certainly raises serious legal questions. Because many plaintiffs have their sole means of support at stake, the balance of hardships tips sharply in their favor. Thus, under both alternative tests for preliminary injunction, the plaintiffs have demonstrated their right to provisional relief pending the final disposition of this case.

The plaintiffs request certification of both a nationwide class and a Ninth Circuit subclass for the pur-

pose of this injunction. As to the proposed Ninth Circuit class, the plaintiffs define it to be "all persons whose rights and benefits are, have been, or will be denied by defendants' express refusal to follow the judicial precedent" set by the *Patti* and *Finnegan* cases. This court now finds that this group fulfills the requirements for class certification under Federal Rule of Civil Procedure 23(a). Since the defendants estimate that the proposal class will include over 72,000 terminees, not to mention those future terminees who will be protected by the requested injunction, the class is indeed "so numerous that joinder of all members is impracticable." The common constitutional challenge to the policy of nonacquiescence is a legal claim shared by all class members. The class representatives' claims are typical of those of the class since they stem from the same course of conduct, again the nonacquiescence, and pose the same constitutional challenge thereto. The representatives are adequate because they have no interests antagonistic to the class members and seek the identical relief sought for the class. Moreover, counsel for these representatives are able and experienced in protecting the interests of the poor.

The proposed Ninth Circuit class also fulfills the requirement of Federal Rule of Civil Procedure 23 (b)(2). Final injunctive relief is appropriate with respect to the class as a whole because the Secretary has acted on grounds generally applicable to the class, i.e., her alleged authority to nonacquiesce in *Patti* and *Finnegan*. Thus the proposed class action will be adjudged maintainable, pursuant to Rule 23 (c)(1).

In light of the foregoing, this court certifies a class of plaintiffs who live within this circuit, consisting of SSI and SSDI recipients who have been or will be considered for termination after August 30, 1981,[8] and SSI recipients under the "grandfather clause" of the Social Security Act who have been or will be considered for termination after August 25, 1980,[9] and excluding those who have been or will be terminated due to reasons unrelated to current disability or medical improvement (e.g., actual return to work or improvement in financial condition).

While sympathetic with plaintiffs' challenge to the Secretary's nonacquiescence policy, this court declines to certify a nationwide class and issue an injunction in gross. This court is unfamiliar with the nature and extent of the Secretary's interference by nonacquiescence with federal appellate precedent in other circuits. Courts in those circuits will be better equipped to preserve the law as announced by their respective courts of appeals than is this court.

All members of the class here established have a right to the protection of the law of this circuit. The injunction to be issued will permit restoration of

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[8] This date represents the date on which *Patti* became final (i.e., the date upon which the Court of Appeals denied rehearing and rehearing *en banc* (June 30, 1982) plus sixty days, the time during which the Secretary could have sought review of the decision (August 30, 1982)), minus one year (August 30, 1981). The one year is subtracted because the Secretary has authority, for any reason, to reopen cases up to one year after administrative decisions become final. 20 C.F.R. §§ 404.988, 416.1488.

[9] This date represents the date on which *Finnegan* became final (August 25, 1981) minus one year (August 25, 1980).

benefits,[10] subject to termination proceedings that will follow the requirements of the law.

DATED: June 16, 1983.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

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[10] This court is mindful that the provisional remedy prescribed in the accompanying order does not restore the class members to the *status quo* existing before termination. To do so would require an award to each class member of those benefits not received by virtue of the Secretary's failure to terminate them in accordance with the law of this circuit. It would be inappropriate to grant such an award at this juncture, however, because this controversy has not been fully litigated and the plaintiffs have not requested such relief.

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 83-0697-WPG(T)

MARIO LOPEZ, ET AL., PLAINTIFFS

v.

MARGARET M. HECKLER, ET AL., DEFENDANTS

[Filed Jun. 16, 1983]

ORDER

Pursuant to the Memorandum of Decision filed this date,

IT IS ORDERED THAT:

1. The reference to the magistrate of the matters concerned in this order is vacated.

2. The defendants' motion to dismiss for want of jurisdiction is denied.

3. The plaintiffs' motion for certification of a Ninth Circuit class is granted, and such class shall consist of all persons who live within this circuit, who (a) receive or received Supplemental Security Income Disability benefits or social security disability insurance benefits and have been or will be considered for termination after August 30, 1981, or (b) receive or received Supplemental Security In-

come Disability benefits under the "grandfather clause" of the Social Security Act and have been or will be considered for termination after August 25, 1980. This class does not include those who have been or will be terminated due to reasons unrelated to current disability or medical improvement (e.g., actual return to work or improvement in financial condition).

The plaintiffs' motion for certification of a nationwide class is denied.

4. The plaintiff's motion for a preliminary injunction is granted as follows:

The defendants, their agents and employees are enjoined and restrained within the Ninth Circuit:

(a) From failing to follow, implement or accord precedential effect to *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981) and *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), copies of which are contained in Exhibits A and B, attached hereto.

(b) From implementing the nonacquiescence policy contained in Social Security Rulings Nos. 82-10c, 82-49c and 81-6, attached hereto, Exhibits A, B and C.

(c) In order to accomplish appropriate restoration of disability benefits pending resolution of this action, the court orders the defendants to implement the following procedure:

> (i) Within sixty (60) days following the date of this order, the defendants will notify (a) each class member who had been receiving Supplemental Security Income Disability benefits under 42 U.S.C. § 1382c(a)(3)(E), and who was terminated from such benefits after August 25, 1980, and (b) all other persons who have been terminated from either Title II social secu-

rity disability insurance of Title XVI Supplemental Security Income Disability after August 30, 1981, for the purported reason that his or her disability had ceased, whether or not such person has appealed, that:

> Such person may apply for reinstatement of benefits if he or she believes that his or her medical condition has not improved following the granting of disability benefits.

(ii) Upon receiving such application, the defendants will forthwith reinstate and pay benefits in the monthly amounts such person would have been receiving had his or her benefits not been interrupted.

(iii) Following such reinstatement, if the defendants or their agents or employees conduct a disability investigation or other screening of such person, they will apply the standards set forth in *Patti v. Schweiker* and *Finnegan v. Matthews* and, if they conclude that such person's medical condition has improved and he or she is no longer disabled, they will identify the evidence relied upon to reach that conclusion.

(iv) Following such review, persons who are notified of an initial determination that their benefits shall cease shall be given an opportunity to contest the determination and pending such review, they shall continue to receive aid as provided in current laws and regulations.

DATED: June 16, 1983.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

EXHIBIT A

SECTION 1614(a)(3)(E) (42 U.S.C. 1382c(a)(3)(E) SUPPLEMENTAL SECURITY INCOME—CONTINUANCE OR CESSATION OF A GRANDFATHEREE'S DISABILITY—A RULING OF NON-ACQUIESCENCE

20 CFR 416.994(e) SSR 82-10c

Finnegan v. Matthews, 641 F.2d 1330 (1981)

The Social Security Administration (SSA) does not acquiesce in the court's decision.

The claimant, who had been receiving State disability welfare payments since 1972, was grandfathered into the Supplemental Security Income (SSI) program on January 1, 1974. Section 1614(a)(3)(E) of the Social Security Act (the Act) provides for the continued payment of SSI benefits to a grandfatheree who "is permanently and totally disabled as defined under a State plan . . . so long as he is continuously disabled as so defined." Following a continuing disability investigation, SSA determined that the claimant's SSI benefits would terminate because he did not meet the requirements for entitlement at the time of the continuing disability investigation. This determination was affirmed by the district court.

The court of appeals, however, reversed SSA's determination. It found that SSI disability benefits to a grandfatheree may not be terminated unless SSA shows that there was either a material improvement in the grandfatheree's medical condition or a clear and specific error in the prior State determination. Because neither of those conditions was shown by

SSA to be met, the court held that SSA's termination of the claimant's SSI benefits was improper.

SSA believes that the court's standard for determining whether SSI disability benefits to a grandfatheree should terminate would be impossible to administer and that the correct standard for making such a determination is in 20 CFR 416.994(e); i.e., that disability of a grandfatheree terminates when his or her "disability as shown by current medical or other evidence does not meet the criteria of the appropriate State plan" and does not meet the Federal criteria. Many grandfatherees were on State disability rolls for years before conversion, and the evidence on which they were originally allowed may not be available, or may not even exist. Therefore, in those cases, SSA could not possibly prove either "material improvement" or "clear and specific error" in the prior State determination. Thus, under 20 CFR 416.994(e) the grandfatheree properly remains in SSI benefit status only until it is found that the grandfatheree's disability, as shown by current medical or other evidence, meets neither the State nor Federal definition of disability. SSA believes that this regulation is fully consistent with the requirements of section 1614(a)(3)(E) of the Act and with congressional intent.

Consequently, SSA *holds* that the standard in 20 CFR 416.994(e), and not the one set forth by the court, should apply in determining whether the disability of a title XVI grandfatheree has ceased.

[The court of appeals' opinion in *Finnegan v. Mathews* is appended to the ruling but is not reproduced here].

EXHIBIT B

SECTION 1614(a)(3)(A) (42 U.S.C. 1382c(a)(3)(A)) SUPPLEMENTAL SECURITY INCOME —CONTINUANCE OR CESSATION OF A NON-GRANDFATHEREE'S DISABILITY—A RULING OF NONACQUIESCENCE

20 CFR 416.994 SSR 82-49c

Patti v. Schweiker, 9th Circuit, Civ. No. 80-5763 (2/18/82)

The Social Security Administration (SSA) does not acquiesce in the court's decision.

The claimant had been receiving supplemental security income (SSI) benefits as a disabled individual since 1976. In December 1977, SSA informed the claimant that her disability had ceased. After a hearing in March 1978, this determination was reversed by an administrative law judge (ALJ) and the claimant's benefits were continued. SSA then informed the claimant that her disability had ceased in April 1979, and that determination was affirmed by the district court.

The Court of Appeals, however, reversed SSA's determination. The court found that the determination of disability in 1978 gave rise to a presumption at the hearing in 1979 that the claimant was still disabled. While the opinion acknowledges that this presumption does not shift the burden of proof and the claimant still has the burden of proving her case, the court found that the presumption imposes on the Secretary the burden of going forward with evidence that the claimant's condition has medically improved or otherwise changed. Finding that there was essen-

tially no evidence to support a conclusion that the claimant's condition had changed, the court held that SSA's determination that the claimant's disability had ceased was not supported by substantial evidence.

In essence, the court has concluded that SSA must show that an SSI recipient's condition has improved or otherwise changed before it can determine that the recipient's disability has ceased. SSA disagrees with the court's conclusion that medical improvement or other change is required in these cases.

Regardless of whether medical improvement or other change is or is not shown, under 20 CFR 416.994(b)(1), a determination of cessation is appropriate for an SSI *nongrandfatheree* if the recipient is not disabled under the Federal criteria, i.e., current medical or other evidence shows that the recipient is able to engage in substantial gainful activity.[4]

Since the claimant in *Patti* is an SSI grandfatheree, SSA determined that her disability ceased in April 1979 because it found, on the basis of current medical evidence, that she was capable of engaging in substantial gainful activity (i.e., she does not meet the Federal definition of disability).

As noted above, under 20 CFR 416.994(b)(1), issued in August 1980, SSA is not required to show medical improvement or other change in order to terminate SSI disability benefits. However, the final administrative decision in *Patti* was issued prior to August 1980 so that the court's decision in *Patti* was based on an administrative decision involving regulations no longer in effect. Moreover, the Court of Ap-

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[4] A showing of medical improvement or other change is also not required in cessation cases involving an SSI grandfatheree (see SSR 82.100 [*sic*] (Jan. 1982)).

peals in *Patti* did not even address either the August 1980 regulations or the earlier regulations governing when disability ceases. For these reasons (and since there are other Court of Appeals decisions which do not require a showing of improvement to terminate disability benefits), we believe that *Patti* does not provide a judicial interpretation of the disability regulations which should be followed.

Consequently, SSA *holds* that, even if current medical or other evidence does not show "medical improvement" or other change, the disability of a non-grandfathered SSI recipient is subject to cessation if such evidence shows that the recipient is able to engage in substantial gainful activity (i.e., the recipient does not meet the Federal definition of disability).

[The court of appeals' opinion in *Patti v. Schweiker*, is appended to the ruling but is not reproduced here].

EXHIBIT C

Continuance or Cessation

(Previously Published as PPS-54) SSR 81-6

TITLES II AND XVI: CONTINUANCE OR CESSATION OF DISABILITY OR BLINDNESS

PURPOSE: To state the policy of determining whether disability of blindness under titles II and XVI continues or ceases.

CITATIONS (AUTHORITY): Sections 221 and 1631 of the Social Security Act, Regulations No. 4, sections 404.1579, 404.1586 and 404.1594, Regulations No. 16, section 416.994.

PERTINENT HISTORY: Under operating guides which have been in effect for approximately 3 years, disability or blindness is found to have ceased when current evidence shows that the individual does not meet the definition of disability or blindness under which his or her claim was allowed, it is not necessary to show that the individual's medical condition has "improved" since the prior determination. However, prior regulations had been interpreted by some to mean that before cessation of disability or blindness could be found, there must have been a positive showing of medical improvement. Such an interpretation precluded a finding of cessation in cases where current evidence showed that the individual was not disabled or blind, but it could not be shown that actual "improvement" had taken place. The regulations have now been revised to clarify this issue.

POLICY STATEMENT: Where the evidence obtained at the time of a continuing disability investigation (CDI) establishes that the individual is not currently disabled or blind, a finding of cessation is appropriate. It will not be necessary to determine whether or how much the individual's condition has medically improved since the prior favorable determination.

EFFECTIVE DATE: Final regulations covering this policy were effective August 20, 1980, the date of publication in the Federal Register (45 FR 55566).

CROSS-REFERENCES: Program Operations Manual System section 2864; Claims Manual Section 6700ff; Disability Operating Manual section 500ff.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 83-697-WPG(T)

MARIO LOPEZ, ET AL., PLAINTIFFS

vs.

MARGARET M. HECKLER, ET AL., DEFENDANTS

[Filed Jul. 27, 1983]

MEMORANDUM OF DECISION

On June 16, 1983, following a hearing, this court entered an order directing, among other things, that certain people that had been terminated from receiving social security disability benefits might apply for reinstatement of those benefits, and that the defendants would be obliged to resume payment to all people so applying, pending further investigation or screening by the defendants in accordance with such order. On July 13, 1983, a further hearing took place. The court then took under submission the question of whether the defendants should be entitled to recoup such interim payments, made pursuant to the order of June 16, 1983, if, as a result of the subsequent investigation and screening, it is ultimately

determined, under standards directed by the court, that the medical condition of the individual concerned had improved as of the time of prior termination of benefits.

The court now concludes that such recoupment would be justified, subject to the qualification that no such recoupment shall be made from ". . . any person who is without fault if such adjustment or recovery would . . . be against equity and good conscience." 42 U.S.C. § 404(b).

The action of the court in ordering reinstatement stemmed from the conclusion that the defendants had been terminating benefits without giving adequate consideration to the requirement that evidence be produced showing improvement in the recipient's medical condition. Thus, the court has required that the defendants "take another look" at the case of each person that applies for reconsideration and make a new determination based upon medical evidence. If the further review fails to establish evidence that the claimant's medical condition had or has improved, his reestablished benefits will continue and the interim payments will prove to have been justified. On the other hand, if the subsequent finding is that medical evidence was produced at the earlier hearing that would negative continued disability, the conclusion follows that the earlier termination of benefits was justified. Under such circumstances, the interim payments ordered by the court would have constituted an unjustified windfall to the claimant.

The principle is well established that a person who receives money to which he ultimately is determined not to be entitled, must make restitution accordingly. This principle has been applied with respect to social security claimants that have received interim payments pursuant to court injunction. *White v. Ma-*

thews, 559 F.2d 852 (2d Cir. 1977); *Barnett v. Califano*, 580 F.2d 28 (2d Cir. 1978).

The motive of this court in ordering reinstatement of benefits for all who applied was to prevent further hardship to those that may have been wrongfully terminated. This was done even in the acknowledged awareness that payments would be resumed to some who would not be entitled thereto because of medical improvement in their health. As the opinion in *Barnett* asserted, one of the justifications for ordering interim payments under these circumstances is the assumption that recoupment may be had if the claimant is ultimately found not to have been eligible.

The plaintiffs point out that, under S.S.R. 82-66, the defendant's policy is not to impose a retroactive cessation of benefits ". . . against beneficiaries who, during the retroactive period, believed in good faith that their disability continued." In implementing that policy, the Commissioner of Social Security causes cessation of payments to coincide with the month in which the claimant is notified of such proposed cessation. The plaintiffs argue that, inasmuch as the process resulting in a decision to terminate benefits was flawed, the notice of cessation should be considered a nullity. Thus, under the defendant's own policies, the benefits should be resumed for all who apply until appropriately conducted proceedings result in a new determination of cessation.

However, the above mentioned policy of not imposing retroactive cessation has several exceptions designed to share such policy with equitable considerations. For example, retroactive cessation would be applicable where a claimant's treating physician had informed him that he had the capacity to return to work, or the claimant actually had returned to work

successfully, or the claimant failed to cooperate by furnishing relevant evidence or failed to appear for examination.

Under the circumstances here concerned, all applicants for resumption of benefit payments will know that the defendants previously have concluded that their benefits should cease. They know also that the justification for such action depends upon whether or not their medical conditions had improved. I find no inequity in causing potential claimants to understand that they may be obliged to repay the interim benefits ordered by this court if subsequent proceedings establish that their medical condition had improved at the time of the earlier cessation. Those who are in good faith can make their own assessments of the available evidence and determine for themselves the likelihood of their being called upon to make reimbursement of the interim payments that they receive. Those who are aware that their medical conditions had substantially improved should be discouraged from seeking a windfall by receiving benefits that they know that they do not deserve but can nonetheless be retained.

In coming to the decision here announced, this court relies, as did Judge Feinberg in *Barnett v. Califano*, 580 F.2d 28, 33 (2d Cir. 1978), upon the fact that the Secretary, in considering the matter of recoupment of overpayment, has the right to avoid penalizing a recipient ". . . who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would . . . be against equity or good conscience."

DATED: July 27, 1983.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 83-697-WPG(T)

MARIO LOPEZ, ET AL., PLAINTIFFS

vs.

MARGARET M. HECKLER, ET AL., DEFENDANTS

[Filed Aug. 4, 1983]

AMENDMENTS TO MEMORANDUM OF DECISION AND ORDER OF June 16, 1983

Defendants' Motion to Modify and Clarify the Court's Order of June 16, 1983, was considered at a hearing on July 13, 1983. The Memorandum of Decision and the Order of June 16, 1983, are hereby modified as follows:

(1) Substitute the following paragraph for the paragraph beginning at line 18 of page 8 of the Memorandum of Decision:

> In light of the foregoing, this court certifies a class of plaintiffs who live within this circuit,

consisting of SSI and SSDI recipients who have been or will be considered for termination after August 30, 1981,[8] and SSI recipients under the "grandfather clause" of the Social Security Act who have been or will be considered for termination after August 25, 1980,[9] such consideration being or having been for the asserted reason that the claimant's disability had ceased.

(2) Substitute the following paragraph for the paragraph beginning at line 23 of page 1 of the Order:

> The plaintiffs' motion for certification of a Ninth Circuit class is granted, and such class shall consist of all persons who live within this circuit, who (a) receive or received Supplemental Security Income disability benefits or Social Security disability insurance benefits and have been or will be considered for termination after August 30, 1981, or (b) receive or received Supplemental Security Income disability benefits under the "grandfather clause" of the Social Security Act, 42 U.S.C. § 1382c(a)(3)(E), and have been or will be considered for termination after August 25, 1980, such consideration being or having been for the asserted reason that the claimant's disability had ceased.

(3) Substitute the following texts for footnotes 8 and 9 on page 12 of the Memorandum of Decision:

> [8] This date represents the date upon which the Court of Appeals denied rehearing and rehearing *en banc* in *Patti* (June 30, 1982) plus sixty days, and minus one year (August 30, 1981). The sixty-day figure represents a compromise between the positions of the parties

with respect to the date upon which *Patti* became final. The Government contends that *Patti* became final at the end of the ninety-day period following the denial of rehearing, during which time the Government could have sought a writ of certiorari from the Supreme Court. 28 U.S.C. § 2101(c). The plaintiffs point out that, generally, the mandate of the Court of Appeals can be stayed for only thirty days. FRAP 41 (b).

The one year is subtracted because the Secretary has authority, for any reason, to reopen cases up to one year after administrative decisions become final. 20 C.F.R. §§ 404.988, 416.1488.

[9] Following the rationale of note 8, *infra*, this date represents the date upon which the Court of Appeals denied rehearing in *Finnegan* (June 25, 1981), plus sixty days and minus one year (August 25, 1980).

DATED: August 4, 1983.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX I

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. *Provisions of the Judicial Code Involved*

1. 28 U.S.C. (Supp. V) 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 28 U.S.C. 1361 provides:

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

B. *Provisions of the Social Security Act Involved*

1. Section 205(a), (b), (g) and (h) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405(a), (b), (g) and (h) provide:

Evidence, procedure and certification for payments

(a) Rules and regulations; procedures

The Secretary shall have full power and authority to make rules and regulations and to es-

tablish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determination of entitlement to benefits statement; findings of fact; hearings; investigations

The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request

with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

(g) Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The

court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and deci-

sion shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of the Secretary or any vacancy in such office.

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

2. Sections 221(a) and (d) of the Social Security Act, as codified at 42 U.S.C. (Supp. V) 421(a) and (d), provide:

Disability determinations

(a) State agencies

(1) In the case of any individual, the determination of whether or not he is under a disability (as defined in section 416(i) or 423(d) of this title) and of the day such disability began, and the determination of the day on which such disability ceases, shall be made by a State agency, notwithstanding any other provision of

law, in any State that notifies the Secretary in writing that it wishes to make such disability determinations commencing with such month as the Secretary and the State agree upon, but only if (A) the Secretary has not found, under subsection (b)(1) of this section, that the State agency has substantially failed to make disability determinations in accordance with the applicable provisions of this section or rules issued thereunder, and (B) the State has not notified the Secretary, under subsection (b)(2) of this section, that it does not wish to make such determinations. If the Secretary once makes the finding described in clause (A) of the preceding sentence, or the State gives the notice referred to in clause (B) of such sentence, the Secretary may thereafter determine whether (and, if so, beginning with which month and under what conditions) the State may again make disability determinations under this paragraph.

(2) The disability determinations described in paragraph (1) made by a State agency shall be made in accordance with the pertinent provisions of this subchapter and the standards and criteria contained in regulations or other written guidelines of the Secretary pertaining to matters such as disability determinations, the class or classes of individuals with respect to which a State may make disability determinations (if it does not wish to do so with respect to all individuals in the State), and the conditions under which it may choose not to make all such determinations. In addition, the Secretary shall promulgate regulations specifying, in such detail as he deems appropriate, performance

standards and administrative requirements and procedures to be followed in performing the disability determination function in order to assure effective and uniform administration of the disability insurance program throughout the United States. The regulations may, for example, specify matters such as—

(A) the administrative structure and the relationship between various units of the State agency responsible for disability determinations.

(B) the physical location of and relationship among agency staff units, and other individuals or organizations performing tasks for the State agency, and standards for the availability to applicants and beneficiaries of facilities for making disability determinations.

(C) State agency performance criteria, including the rate of accuracy of decisions, the time periods within which determinations must be made, the procedures for and the scope of review by the Secretary, and, as he finds appropriate, by the State, of its performance in individual cases and in classes of cases, and rules governing access of appropriate Federal officials to State offices and to State records relating to its administration of the disability determination function,

(D) fiscal control procedures that the State agency may be required to adopt, and

(E) the submission of reports and other data, in such form and at such time as the Secretary may require, concerning the

State agency's activities relating to the disability determination.

Nothing in this section shall be construed to authorize the Secretary to take any action except pursuant to law or to regulations promulgated pursuant to law.

* * * * *

(d) Hearings and judicial review

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) of this section shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title with respect to decisions of the Secretary, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

* * * * *

3. Sections 1631(c) and(d)(1) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 1383(c) and (d)(1), provide:

Procedure for payment of benefits

* * * * *

(c) Hearing to determine eligibility or amount of benefits; time within which to request hearing; time for determinations of Secretary pursuant to hearing; judicial review

(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Secretary which involves a determination of disability and which is in whole or in part unfavorable to such

individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

(d) Procedures applicable; prohibition on assignment of payments; representation of claimants; maximum fees; penalties for violations

(1) The provisions of section 407 of this title and subsections (a), (d), (e), and (f) of section 405 of this title shall apply with respect to this part to the same extent as they apply in the case of subchapter II of this chapter.

* * * * *

C. *Regulatory Provisions Involved*

Part 400, Subpart J, of Title 20 of the Code of Federal Regulation provides in pertinent part:

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

* * * * *

INTRODUCTION, DEFINITIONS, AND INITIAL DETERMINATIONS

§ 404.900 Introduction.

(a) *Explanation of the administrative review process.* This subpart explains the procedures we follow in determining your rights under title

II of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) *Initial determination.* This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in § 404.902, that gives you a right to further review.

(2) *Reconsideration.* If you are dissatisfied with an initial determination, you may ask us to reconsider it. Generally, you must request a reconsideration before you may request a hearing.

(3) *Hearing.* If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) *Appeals Council review.* If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) *Federal court review.* When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) *Expedited appeals process.* At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) *Nature of the Administrative review process.* In making a determination or decision in your case, we conduct the administrative review process in an informal, nonadversary manner. In each step of the review process, you may present any information you feel is helpful to your case. We will consider it and all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

* * * * *

§ 404.902 Administrative actions that are initial determinations.

Initial determinations are the determinations we make that are subject to administrative and judicial review. The initial determination will

state the important facts and give the reasons for our conclusions. In the old age, disability, dependents' and survivors' insurance programs, initial determinations include, but are not limited to, determinations about—

(a) Your entitlement or your continuing entitlement to benefits;

* * * * *

§ 404.903 Administrative actions that are not initial determinations.

Administrative actions that are not initial determinations may be reviewed by us, but they are not subject to the administrative review process provided by this subpart, and they are not subject to judicial review. These actions include, but are not limited to, an action—

* * * * *

(j) Denying your request to extend the time period for requesting review of a determination or a decision;

* * * * *

(l) Denying your request to reopen a determination or a decision; * * *

* * * * *

§ 404.904 Notice of the initial determination.

We shall mail a written notice of the initial determination to you at your last known address. The reasons for the initial determination and the effect of the initial determination will be stated in the notice. The notice also informs you of the right to a reconsideration or to a hearing. We will not mail a notice if the beneficiary's entitle-

ment to benefits has ended because of his or her death.

§ 404.905 Effect of an initial determination.

An initial determination is binding unless you request a reconsideration or a hearing, as appropriate, within the stated time period, or we revise the initial determination.

RECONSIDERATION

§ 404.907 Reconsideration—general.

Reconsideration is the first step in the administrative review process that we provide if you are dissatisfied with the initial determination. However, if the initial determination is that your blindness or disability has ceased due to medical reasons, and you have a right to a hearing on the same issue in connection with a claim for supplemental security income benefits, your first step is to request a hearing right after the initial determination. If you are dissatisfied with our reconsidered determination, you may request a hearing.

§ 404.908 Parties to a reconsideration.

(a) *Who may request a reconsideration.* If you are dissatisfied with the initial determination, you may request that we reconsider it. In addition, a person who shows in writing that his or her rights may be adversely affected by the initial determination may request a reconsideration.

* * * * *

§ 404.909 How to request reconsideration.

(a) We shall reconsider an initial determination if you or any other party to the reconsideration files a written request—

(1) Within 60 days after the date you receive notice of the initial determination (or within the extended time period if we extend the time as provided in paragraph (b) of this section);

* * * * *

(b) *Extension of time to request a reconsideration.* If you want a reconsideration of the initial determination but do not request one in time, you may ask us for more time to request a reconsideration. Your request for an extension of time must be in writing and must give the reasons why the request for reconsideration was not filed within the stated time period. If you show us that you had good cause for missing the deadline, we will extend the time period. To determine whether good cause exists, we use the standards explained in § 404.911.

§ 404.911 Good cause for missing the deadline to request review.

(a) In determining whether you have shown that you had good cause for missing a deadline to request review we consider—

(1) What circumstances kept you from making the request on time;

(2) Whether our action misled you;

(3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions.

(b) Examples of circumstances where good cause may exist include, but are not limited to, the following situations:

(1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.

(2) There was a death or serious illness in your immediate family.

(3) Important records were destroyed or damaged by fire or other accidental cause.

(4) You were trying very hard to find necessary information to support your claim but did not find the information within the stated time periods.

(5) You asked us for additional information explaining our action within the time limit, and within 60 days of receiving the explanation you requested reconsideration or a hearing, or within 30 days of receiving the explanation you requested Appeal Council review or filed a civil suit.

(6) We gave you incorrect or incomplete information about when and how to request administrative review or to file a civil suit.

(7) You did not receive notice of the determination or decision.

(8) You sent the request to another Government agency in good faith within the time limit and the request did not reach us until after the time period had expired.

(9) Unusual or unavoidable circumstances exist which show that you could not have known of the need to file timely, or which prevented you from filing timely.

* * * * *

§ 404.918 Reconsidered determination.

After you or another person requests a reconsideration, we shall review the evidence considered in making the initial determination and any other evidence we receive. We shall make our determination based on this evidence.

§ 404.920. Effect of a reconsidered determination.

The reconsidered determination is binding unless—

(a) You or any other party to the reconsideration requests a hearing within the stated time period and a decision is made;

(b) The expedited appeals process is used; or

(c) The reconsidered determination is revised.

§ 404.921 Notice of a reconsidered determination.

We shall mail a written notice of the reconsidered determination to the parties at their last known address. We shall state the specific reasons for the determination and tell you and any other parties of the right to a hearing. If it is appropriate, we will also tell you and any other parties how to use the expedited appeals process.

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HEARINGS

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§ 404.930 Availability of a hearing.

(a) You may request a hearing if we have made—

(1) A reconsidered determination;

(2) A revised determination of an initial or reconsidered determination;

(3) An initial determination that your blindness or disability has ceased due to medical reasons, and you have a right to a hearing on the same issue in connection with a claim for supplemental security income benefits; or

(4) A revised decision based on evidence not included in the record on which the prior decision was based.

(b) We will hold a hearing only if you or another party to the hearing file a written request for a hearing.

§ 404.932 Parties to a hearing.

(a) *Who may request a hearing.* You may request a hearing if a hearing is available under § 404.930. In addition, a person who shows in writing that his or her rights may be adversely affected by the decision may request a hearing.

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§ 404.933 How to request a hearing.

(a) *Written request.* You may request a hearing by filing a written request. You should include in your request—

(1) The name and social security number of the wage earner;

(2) The reasons you disagree with the previous determination or decision;

(3) A statement of additional evidence to be submitted and the date you will submit it; and

(4) The name and address of any designated representative.

(b) *When and where to file.* The request must be filed—

(1) Within 60 days after the date you receive notice of the previous determination or decision (or within the extended time period if we extend the time as provided in paragraph (c) of this section);

* * * * *

(c) *Extension of time to request a hearing.* If you have a right to a hearing but do not request one in time, you may ask for more time to make your request. The request for an extension of time must be in writing and it must give the reasons why the request for a hearing was not filed within the stated time period. You may file your request for an extension of time at one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 409.911.

* * * * *

§ 404.955 The effect of the administrative law judge's decision.

The decision of the administrative law judge is binding on all parties to the hearing unless—

(a) You or another party request a review of the decision by the Appeals Council within the stated time period, and the Appeals Council reviews your case;

(b) You or another party requests a review of the decision by the Appeals Council within the stated time period, the Appeals Council denies your request for review, and you seek judicial review of your case by filing an action in a Federal district court;

(c) The decision is revised by an administrative law judge or the Appeals Council under the procedures explained in § 404.987;

(d) The expedited appeals process is used; or

(e) The division is a recommended decision directed to the Appeals Council.

APPEALS COUNCIL REVIEW

§ 404.967 Appeals Council review—general.

If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action. The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge. The Appeals Council shall notify the parties at their last known address of the action it takes.

§ 404.968 How to request Appeals Council review.

(a) *Time and place to request Appeals Council review.* You may request Appeals Council review by filing a written request. Any documents or other evidence you wish to have considered by the Appeals Council should be submitted with your request for review. You may file your request—

(1) Within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section);

* * * * *

(b) *Extension of time to request review.* You or any party to a hearing decision may ask that the time for filing a request for the review be extended. The request for an extension of time must be in writing. It must be filed with the Appeals Council, and it must give the reasons why the request for review was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 404.911.

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§ 404.981 Effect of Appeals Council's decision or denial of review.

The Appeals Council may deny a party's request for review or it may decide to review a case and make a decision. The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised. You may file an action in a Federal district court within 60 days after the date you receive notice of the Appeals Council's action.

§ 404.982 Extension of time to file action in Federal district court.

Any party to the Appeals Council's decision or denial of review, or to an expedited appeals

process agreement, may request that the time for filing an action in a Federal district court be extended. The request must be in writing and it must give the reasons why the action was not filed within the stated time period. The request must be filed with the Appeals Council, or if it concerns an expedited appeals process agreement, with one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 404.911.

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REOPENING AND REVISING DETERMINATIONS AND DECISIONS

§ 404.987 Reopening and revising determinations and decisions.

(a) *General.* Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review. However, a determination or a decision made in your case may be reopened and revised. After we reopen your case, we may revise the earlier determination or decision.

(b) *Procedure for reopening and revision.* You may ask that a determination or a decision to which you were a party be revised. The conditions under which we will reopen a previous determination or decision are explained in § 404.988.

§ 404.988 Conditions for reopening.

A determination, revised determination, decision, or revised decision may be reopened—

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case; * * *

§ 404.989 Good cause for reopening.

(a) We will find that there is good cause to reopen a determination or decision if—

* * * * *

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

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